

Customs & Trade in Israel

A Legal Newsletter

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Trading With The Enemy

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In an era of liberal global trade and a profusion of international commercial corporations, it is a common occurrence for commercial transactions to raise the question of whether this act may actually constitute trading with the enemy.

The Trading With The Enemy Ordinance was enacted during the British mandate in 1939, and completely prohibits conducting any economic activity, directly or indirectly, between the State of Israel and its citizens and an enemy state, an entity within an enemy state, an enemy citizen, or on their behalf. Trading with the enemy is a criminal offense, subject to up to ten years in prison and heavy monetary fines.

Israel's Supreme Court previously ruled in the Dirani Case (2011) that the essence of the ordinance is to prevent the strengthening of the enemy - **"the main purpose of the ordinance is to prevent trade with the enemy, in order to prevent it from strengthening"**.

Who is defined as an enemy under the Ordinance?

The definition of an enemy in the Ordinance is not clear. Under the ordinance, an enemy is defined as any state or ruler of a state "in a state of war with the State of Israel", as well as a person residing in an enemy state, an enemy citizen, and a group of people who conduct business anywhere across the globe, if it is under the supervision of the enemy.

The Finance Minister is the entity empowered by the Ordinance to determine which area or state are considered an enemy, but an actual definition of which countries Israel is at war with is absent from the Ordinance, and any other law for that matter.

Currently, publications on the Chief Economist of the Finance Ministry website list Iran, Syria and Lebanon as enemy states. In addition, Iraq is also considered an enemy state, though the Finance Minister routinely publishes a temporary trade permit, with the most recent permit in effect until March 31, 2019.

The prohibition upon trading with the enemy is comprehensive, prohibiting Israeli citizens (including Israeli companies and their subsidiaries worldwide) from trading with corporations anywhere across the globe - including neutral or friendly countries - if the corporations are supervised by an enemy as defined in the Ordinance.

It should be clarified that an enemy under the Ordinance is not only a citizen of Syria, Iran or Lebanon, but a resident of these countries as well. Even so, not all residents will be considered enemy residents: under the Ordinance, the residents of an enemy country will be considered as such when "... their **last known residence** was in an area that was at the time, or has since become, enemy territory". Case law has yet to clarify the definition of "a resident of an enemy state", and we recommend that any specific question be directed to the Authorized Body in the Finance Ministry.

Nevertheless, based on past experience in representing numerous clients before the Authorized Body, the question of whether a certain individual is a resident of an enemy state hinges upon the individual's connection with the enemy state - where is the center of the individual's life; and whether he is a resident of another country. How one's center of life is defined remains without answer in relevant legislation and case law, but it may be deduced from the criteria set by legislation and case law for determining the fiscal residence of an individual for tax purposes. The examination in the tax field is a question of essence, examining both the objective aspect of where the individual has the most links to; and the subjective aspect, of where the individual sees the center of his life.

The Supreme Court ruled that the question of fiscal residence for tax purposes will include an examination of all information characterizing an assessed individual: duration of stay in Israel (and for our purposes - in the enemy state); the existence of assets in the country; the individual's place of residence; the place of residence of the individual's family; the nature of residency; the individual's origin; the individual's place of birth; and various information which may shed light on the individual's intentions.

What economic-commercial activity is prohibited under the Ordinance?

The ordinance completely prohibits all economic activity with an enemy as defined by the ordinance. The definition of trade under the ordinance includes any monetary, commercial or other relationship with an enemy, as well as supply or receipt of goods, both directly and indirectly. This means that an individual purchasing goods from an entity which is not an enemy may still violate the orders of the Ordinance, if the origin of the goods is from an enemy state.

That said, the reality of global commerce presents Israeli companies operating internationally with various complex issues which must be addressed. For example, would an Israeli company selling services to an international company, which may, as part of its current or future global activity, have commercial activity in an enemy state, be in violation of the law?

The professional entity charged with the matter in the Finance Ministry has previously made clear that each issue must be examined separately, addressing the different parameters which apply to each case in order to determine whether the Trading With The Enemy Ordinance applies. First and foremost, it is determined whether the commercial act is part of the day-to-day commercial activity of the corporation, and not used as a means or a mediator for trade with the enemy. In addition, as the situation requires, various other parameters may be examined, such as the company's business sector, the essence of the product or service in question; the share of Israeli components in the final product which may be sold to the enemy state; etc.

Unique circumstances - permission from the Authorized Body in the Finance Ministry for trade with the enemy

If following an examination, a conclusion is reached that the commercial act is defined as an act prohibited under the Ordinance, and the entity with whom the act is to be performed is defined as an enemy under the Ordinance, it is an illegal activity and a criminal act.

Even so, section (3)(2)(B)(I) of the Trading With The Enemy Ordinance states that an individual will not be considered to have been trading with the enemy if he received permission from the Authorized Body, the Chief Economist in the Finance Ministry. In accordance, under unique circumstances (such as humanitarian need), a request may be submitted for a permit from the Authorized Body.

**The above review is a summary. The information presented is for informative purposes only,
and does not constitute legal advice.**

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