INTERNATIONAL UNIVERSITY TO BUSINESS & LAW

A New Horizon for Arbitration

and Appellate Instance

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**An essay submitted to IUBL in Partial fulfillment of the Requirements
for the Ph.d Degree.**

12 may 2010

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In the more than 40 years in which the Arbitration Law, 5728-1968 has been in effect, it has been amended only twice. Amendment No. 2 to the Law[1], which was enacted fairly recently, brought about a material change in arbitration proceedings, and there are those who regard it as a revolutionary amendment. And already we have before us this book from Adv. Israel Shimony, who was an active proponent of the amendment to the Law.

In the Israeli Bar Association's sixth annual conference, which took place in Eilat in 2006, in a panel in which I took part, the author presented the proposed amendment and his belief in its necessity. Thanks to resolute action in the meetings of the Israeli Knesset's Law and Justice Committee, and with the passing of the second and third votes in the Knesset, the above amendment was finally adopted into law.

So far, we have been taught that a court may repeal an arbitration award under extreme circumstances and if the grounds for annulment set forth in the Arbitration Law are met, but may not review the award as an appeal instance. The difficulty in rectifying errors in judgment deterred many from pursuing arbitration, despite the advantages offered by this process. In this context, the amendment constitutes a turning point. Under the amendment, litigants who have opted to submit their dispute to arbitration, may also agree on appointment of an appellate instance. If the parties did not agree on an appellate instance, but have determined that the arbitrator will act according to law, each litigant may apply to the court against the arbitrator's award. The parties' newfound ability to appeal arbitrator awards mandated a change in the conduct of arbitration proceedings, and indeed new sections were added as well as an addendum to the Law (the Second Schedule) which set forth new procedural provisions, such as the duty to document hearings and the arbitrator's duty to give reasons for his award.

[1] Arbitration Law (Amendment No. 2), 5769-2008, Codex 5769, pp. 22.

The author provides us with in-depth and comprehensive knowledge, and integrates the old and the new, legal thought with business considerations. Court rulings given over the years are reviewed within the context of the innovations enacted under Amendment No. 2 to the Law. All these are presented clearly, in detail, and in an interesting manner. This work by the author will fast become a centerpiece of legal literature.

Tel Aviv-Jaffa, January 2009 Uri Goren

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Introduction

In November 2008 the Arbitration Law (Amendment No. 2), 5769-2008[2] ("Amendment No. 2") was enacted, which amended the Arbitration Law, 5728-1968. Adv. Israel Shimony, who was one of the proponents of the amendment to the Law, was one of the chief forces which initiated the amendment to the law in 2004. Adv. Shimony's belief and tireless actions have, ultimately, brought about the enactment of the amendment to the law, an amendment which created a veritable revolution in the field of arbitration.

The bill was submitted by Knesset Members Gidon Saar and Amira Dotan, and at the initiative of the author, Adv. Israel Shimony (former Deputy Head of the Israeli Bar Association), and Adv. Ronen Setty. The bill began its journey into law in 2004, and was finally enacted, as aforesaid, as an amendment to the Law in late 2008.

Adv. Shimony's efforts to amend the law were driven by the sad state of arbitration in Israel, which did not match modern legal or business dynamics. The old Arbitration Law - which was amended only once in more than 40 years - granted the arbitrator almost absolute authority, even to bring about the financial downfall of an individual or company, without giving reasons, without judicial supervision, and without a right to appeal.

The origins of the arbitration system have been founded in the Jewish People's conciousness for thousands of years. The Old Testament book of Exodus tells of Jethro, Mozes' father-in-law, who came to the desert and watched Mozes adjudicate the nation's disputes from sunrise to sunset. Mozes answers questions, prescribes solutions, and passes judgment. Scripture states that "the people stood by Mozes from the morning unto the evening". Jethro wonders: it cannot be that an entire nation rely on one man alone. Both the man and the nation will eventually wear under the burden, and so, Jethro proposes a solution: instead of Mozes hearing every matter, both large and small, a legal

[2] Codex 5769 pp. 22.

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hierarchy must be instituted, so that only the more complicated issues are brought before Mozes the prophet and leader of the nation; issues which only a man of his stature can resolve. A division of responsibilities must be instituted, which would allow other people to become involved in the judicial process and in the system of law. Jethro, to use current terminology, provides constructive criticism in order to better the plight of the people.

The story of Jethro is somewhat similar to the burden borne by the court system in Israel. The great load borne by judges causes the protraction of many trials, and the outlook is bleak: on average, each judge handles approximately 2,200 cases each year. The weakness of the arbitration process is expressed in data indicating that only 640 arbitration proceedings are held each year, a number which stands in stark contrast to the 1.3 million actions brought before the courts annually.

It seems that the reason for litigants' hesitation to pursue arbitration lies in the failure to realize two important rights in trial: the duty to give reasons for the arbitration award, and the right to appeal.

The amendment to the Arbitration Law - in addition to prescribing the duty to give reasons - allows, with both parties' consent, an appellate process which is determined upon executing the arbitration agreement. The inclusion of the right to appeal in the arbitration process will allow review of the arbitration award, and its rectification - if it indeed be found that the award requires rectification - by a higher, professional instance.

The amendment is expected to be a turning point in the application for arbitration proceedings as an alternative to resolving disputes in court, and may even assist the overburdened legal system in implementing judicial mechanisms for dispute resolution, such as arbitration and mediation proceedings.

The book includes three sections:

a. Section 1 - Basic Principles in Arbitration Law
b. Section 2 - Judicial Process and Appeals
c. Section 3 - International Arbitration and Comparative Law.

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Each section includes chapters which detail the theory and practice in the field, and contain constant reference to Amendment No. 2 to the Arbitration Law, and its effect on the re-invention of arbitration proceedings.

The book also includes appendices, which include relevant international conventions and laws, and detailed keys.

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Section 1 - Basic Principles in Arbitration Law

Chapter 1 - The Arbitration Agreement

Characteristics

The Law's definition of the arbitration agreement refers to an agreement made in writing[3] to submit for arbitration a dispute which has arisen between parties to the agreement, or a future dispute which may arise between such parties. This means, that in order to pursue arbitration, the parties must set such decision in writing, as part of an arbitration agreement made on a specific matter or as part of a previous agreement that they have executed in a particular matter and which agreement states that if a dispute shall arise between the parties, such dispute will be submitted for arbitration. The Arbitration Law does not provide for any special phrasing or format. Thus, the demand for written agreement may be met by exchange of letters between the parties or through electronic communication. An exchange of letters between the parties' representative also meets the requirement for written agreement. The relevance of the requirement for written document is expressed when one party to the agreement files an action with the courts in the matter of arbitration, while the other party - which wishes to pursue arbitration - will not be granted the relief of stay of proceedings in the action due to the requirement for written document not being met.

Modification of the agreement may also be made orally. Moreover, if a party to the arbitration proceedings has continued its participation in the arbitration proceedings despite the change in the agreement, then that party's participation without objection "gives rise to estoppel through representation preventing the party which made a representation to another party from denying such representation, if said other party has relied in good faith and in a reasonable manner on the representation to its detriment"[4]

The arbitration agreement is the foundation on which the arbitration process is based. Therefore, the court will always prefer to interpret the agreement in the manner that agrees with establishment of the arbitration process. This, due to the importance of the principle that agreements be honored, and due to the preference for resolving disputes

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[3] Occasionally, it can also be made not in writing

[4] Civil Appeals Authority 3416/02 **Lido Kineret Ltd., Tiberias v. Mekorot Israel Water Company Ltd.**, Ruling 56(6) 631 (2002), ruling given by Judge Dorner.

between litigants through arbitration over submitting the dispute to court. The court considers it obligatory to uphold the agreement according to the parties' wishes and agreements, especially when dealing with honoring the foreign jurisdiction clause in international agreements. The court will not enforce the foreign jurisdiction clause only upon proof of extraordinary circumstances justifying the violation of the agreement and the initiation of arbitration proceedings in Israel[5].

Despite the principle, whereby preference is to be given to an interpretation that upholds agreements, it is necessary to prove in a clear and convincing manner that the parties' intention was to undertake an arbitration agreement. As consent to undertake an arbitration agreement entails a material injury to the right to appeal to higher instances, which is a recognized legal right, it is necessary to prove the parties' explicit and mutual intent to restrict this right.

How then, can we know that we are dealing with an arbitration agreement and with arbitration proceedings?

According to the precedent set forth in the cases of **Iskov**[6] and **Oil Industries**[7], the test for the existence of an arbitration agreement was carried out through examination of the litigants' intent. In order to examine the parties' intent, the courts determined certain tests in these rulings[8]. For example: If the parties intended to appoint a third person as arbitrator; if a dispute has arisen or will arise between the parites, and which must be decided; if the arbitrator was granted the authority to impose financial obligations on either party; if the appointed arbitrator was authorized to take evidence, and the hearings are conducted according to the order for hearing the parties and not as a multi-party discussion; if there are witnesses who have been warned that they must tell the truth; if attorneys were present in the hearings on behalf of the parties. Execution of an arbitration

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[5] See Civil Appeals Authority Case 4716/04 **hotels.com v. Zooz Tourism Ltd.**, Pador 05(21) 18(2005).
[6] Leave for Appeals Application 135/73 **Iskov v. Chemical Works Dr. Wiegert Ltd.,** Ruling 27(2) 813 (1973).
[7] Civil Appeals Case 241/81 **Oil Industries Ltd and others v. Spice Company Ltd.**, Ruling 39(1) 561 (1985).
[8] In Originating Motion (Jerusalem District) 4377/05 **Arim Urban Development Company Ltd. v. Barad Ltd.**, District Takdin 2007(1) 1159 (2007), Judge Efal-Gabai noted that these tests are cumulative. We believe these tests to be flexible and not necessarily cumulative.

agreement is not essential but, when the time comes, will also attest to the parties' intention to undertake an agreement.

The agreement may be an arbitration agreeement even if the word "arbitration" is not expressly stated[9], provided that the agreement for arbitration is understood through context. It is also necessary to note not only the phrasing employed by the parties, but also the intention behind such phrasing, and the court must understand the parties' considerations and determine what was their true intent upon executing the agreement. If the parties, in their conduct, have referred to an individual as an arbitrator, then by so doing thay have attested their intention that such person will, indeed, serve as an arbitrator in their dispute.

A pre-agreement preceeding a formal agreement, where the terms of the undertaking have been detailed, shall be considered an agreement. If the arbitration agreement refers to a future agreement, there is no need to execute another agreement when the dispute arises. Furthermore, if the principle issues have been noted and the agreement does not provide particulars, the court may supplement these matters and recognize the agreement as an arbitration agreement. Under Section 26 to the Contracts Law (General Part), 5733-1933, the arbitrator may supplement particulars, as a person which the parties have duly authorized to do so.

The arbitration clause survives the annulment of the agreement, as by essence any argument regarding its validity is procedural, and does not go to the heart of the fundamental transaction between the parties. Therefore, if any question arises as regards the validity of the agreement between the parties, the parties shall also litigate this question before an arbitrator. The arbitration clause is a jurisdiction clause which determines the judicial instances to which the parties shall be subject in the event of a dispute. If the arbitrator repeals the validity of the agreement containing the arbitration agreement, such action would result in his not being authorized to make the decision, as

[9] Civil Case (Haifa District) 349/03 **Rubinstein v. Goldbleit**, Pador 04(17) 652 (2004).

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if there is no arbitration agreement, the arbitrator has no authority, and in any case the arbitrator can not decide on his own authority, even to negate it.

The Parties to the Arbitration Process

Under Section 4 to the Arbitration Law, the arbitration agreement and the arbitrator's powers there-under are also maintained regarding the parties' substitutes to the agreement, and the arbitrator's authority under the arbitration agreement is also granted to a substitute arbitrator. This, unless the agreement imply any different intent.

A "substitute" is any person who has been assigned, by law, the right or duty of the original holder of such right or duty, such as an executor of an estate, an heir, a trustee in bankruptcy etc., or under different, voluntary circumstances such as the receiver of rights by contract. The substitute fully replaces the original rights-holder, with the latter disappearing completely. The term "substitute" refers to persons who have replaced as aforesaid a party to an arbitration agreement, with their consent and full knowledge, but does not refer to the heirs of a person who have received his estate upon his death.

If the parties to the agreement are specifically and explicitly named, it must be inferred that parties which are not named in the agreement are not included therein. It is possible that under various circumstances the validity of an arbitration agreement may also be expanded to cover the majority shareholder of a company which has signed the agreement. Even so, this constitutes expansion as far as the parties are concerned, and not substitution. An arbitrator may therefore add a shareholder in a company who has not signed the arbitration agreement to the arbitration proceedings, by force of the company's agreement and it being a party to the arbitration agreement. An arbitrator may determine whether or not he is authorized to deliberate the addition of litigants. The arbitrator may also determine whether or not to grant unveiling of incorporation under the grounds for unveiling, and add the shareholders - if so necessary - in order to fulfill the purpose for which the arbitration agreement was signed.

There is also the question of whether guarantors who have guaranteed the company's obligations shall be considered party to an agreement between such company and another company. Is it possible to seek relief from these guarantors in court, or is it possible to force arbitration proceedings on these guarantors? Court precedent dictates[10] that upon signing as a guarantor to all the obligations of a company guaranteed under the agreement, the guarantor agrees to submit itself to the manner in which the parties have prescribed for the main obligation to submit their dispute to arbitration.

The Duty of Good Faith and the Duty of Proper Disclosure

The duty of good faith has become one of the foundations of contract law in Israel, and also applies to disputing parties in arbitration, and to any persons representing such parties. The duty of good faith also applies to the parties throughout the arbitration process.

The duty of good faith ties between the parties to a negotiation. They are not strangers, and owe each other a certain amount of consideration[11].

The middle path in the application of the good faith principle lies in the balance between the ethical origins of the principle and commercial business needs. Following this path dictates proper business conduct. The principle of good faith indicates a certain departure from individualism and egoism, but does not mandate complete altruism. To quote Justice Barak[12] "It is true that the parties to an agreement are not each other's keepers, but neither should they act like wolves."

The duty of proper disclosure plays an important part in the duty of good faith, especially when dealing with arbitration agreements. Precedent dictates that each party must disclose and submit information to the other party prior to, and upon execution of the

[10] Misc. Civil Applications (Tel Aviv District) 11338/06 **Flamingo Ltd. v. Tsarvan 1996 Ltd.**, District Ruling 5764 (1) 585 (2006).
[11] Daniel Friedman and Nili Cohen **Contracts** Vol. A 515 (5751-1991).
[12] High Court of Justice Case 59/80 **Be'er Sheva Public Transportation Services v. The National Labor Court**, Ruling 35(1) 828, 834 (1980), and see also Additional Hearing 22/82 **Beit Yules v. Raviv**, Ruling 43(1) 441, 484 (1989).

agreement. Important facts must be disclosed, including facts which the other party could have discovered on its own. In most cases, the parties to the arbitration agreement execute the agreement after the dispute has arisen. Under such circumstances, despite the dispute and despite the difficulty in maintaining good faith after one party has been injured by the other, and despite the feelings of resentment, the parties are subject to the duties of good faith and proper disclosure.

Applicability of the Schedules to the Arbitration Law to the Arbitration Agreement

Section 2 to the Arbitration Law prescribes that the arbitration agreement be regarded as containing the provisions of the First Schedule, as these apply, and when no other intent is implied by the agreement. Section 2 to the law indicates that the provisions of the schedule pertain to arbitration procedure and are dispositive. The parties may make stipulations based on these provisions in the arbitration agreement, and if no stipulation is made based on the provisions of the schedule **explicitly**, then the provisions of the schedule shall apply to the agreement.

Sections A-D to the schedule, which will apply to the agreement if it not stipulate otherwise, prescribe procedural provisions, such as: number of arbitrators, composition of the arbitral authority, and the place and time of the arbitration sessions. The provisions of Section D authorize the chairman of the arbitral authority to determine the location and date of the arbitration hearings and to decide in all matters partaining to their procedure. Section E to the schedule determines that the decisions of the arbitrators and the arbitration award sill be given by majority vote, and if no majority be found for the final arbitration award - the chairman will have the casting vote. A minority arbitrator may record his dissenting vote in the arbitration award. Section F determines that in arbitration proceedings where an umpire has been appointed, such arbitrator will assume his position after the other arbitrators, or any one of them, have given him and the litigants written notice that there be no majority for the final arbitration award. Having assumed his position, the umpire will replace the other arbitrators. The provisions of Section G determine that if an arbitrator assume a position as an additional arbitrator, an umpire or a substitute arbitrator, the arbitration will continue from the stage reached prior to such

assumption, unless the arbitrator has requested otherwise. The provisions of Section H determine that the arbitrator may instruct the litigants to fill in interrogatories, to disclose and produce documents, and take any other action pertaining to **conduct of the arbitration**, as a court of law midght do in an action brought before it. Section M deals with the disclosure of documents and the right to review. Section I determines that if the arbitrator has ordered a litigant to carry out any action pertaining to the conduct of the arbitration proceedings, and the litigant fails to fulfill the order without any justifiable cause, the arbitrator, after having warned the litigant, may dismiss the claim, if the order be given against the claimant, or to strike out the defense and decide the dispute as though the defendant had not presented a defense, if the order was issued against the defendant. Section J to the schedule prescribes that the arbitrator shall not hold sessions in the absence of a party, unless written or oral warning was given to that party, that if it fails to appear for the session, the session will be held in its absence. A similar provision also appears in Section 15 to the Law. Section K determines that prior to taking testimony, the arbitrator will warn the witness that it must tell the truth, and that if it fail to do so, it shall be subject to such penalties as prescribed by law. However,in cases where the witnesses were not warned, but were warned in their affidavits and the witnesses have understood that they must tell the truth, the arbitrator's award will not be annulled on these grounds, unless such failure to give warning has caused the witnesses not to understand their role as witnesses. Section L deals with submittal of a matter requiring expert knowledge to the opinion of an expert appointed by the arbitrator. The parties' right to review the arbitration file is prescribed under Section M.

Section N to the schedule goes to the very heart of the arbitration process: "The arbitrator shall act in a manner, which appears to him most conducive... **shall not be bound by substantive law, the rules of evidence, or the rules of procedure that obtain in courts**".

This provision will apply when the parties have not determined the laws that will govern the arbitration process, and is directly related to the grounds for anulment of the arbitration award prescribed under Section 24(7) to the law: "If the arbitrator did not

make the award in accordance with the law, although the arbitration agreement required him to do so". One can say that in cases where the parties have determined that they shall not be subject to substantive law and to the provisions of Section N to the schedule, they may not argue for anulment of the award on the grounds for anulment set forth under Section 24(7). Until the enactment of Amendment No. 2 in 2008, the rule was that if the arbitrator is not required to follow the rules of substantive law, then he is also exempt from giving reasons for his award. Therefore, parties which have not expressly stated in their arbitration agreement that the arbitrator must give reasons for his award, will not be entitled to argue for annulment of the award under Section 24(6).

The non-obligation to give reasons for the award has deterred many from seeking arbitration, as the absence of reasons filled the parties with feelings of uncertainty. Therefore, Amendment No. 2 mandates that reasons be given through the addition of Sectoin O(1) to the First Schedule.

Under Section O, the parties may authorize the arbitrator to give an award at any time that he shall deem fit, or vice versa to restrict him in time. If the award is not given in time, the arbitration agreement shall expire. The number of days until the date on which the award is to be given is counted from the date on which the first arbitration session is held, after the preliminary hearing which determines matters related to the conduct of the arbitration proceedings, such as location of hearings, dates for submitting pleadings, and so forth. Section O to the schedule is related to the grounds for anulment set forth under Section 24(8) to the law: "The award was made after the period for making it had expired", and Section 26(c): "The plea of a party that the award was made out of time shall not be heard, unless he reserved - by written notice to the arbitrator before the award was made - the right to make that plea". When phrasing the arbitration clause, careful consideration must be given whether or not the parties are willing to apply the provisions of Section O to the schedule, as this provision raises quite a few obstacles. The section dictates a target period of three months for the award. This schedule would appear to be a reasonable date which oftentimes corresponds the parties' desire to resolve their dispute

quickly. But the section determines that The arbitrator may extend the period by a further three months.

Section O(1), which was added to the First Schedule to the Arbitration Law, anchored the arbitrator's obligation to give reasons for his award. A new situation arose, where the default situation is that reasons must be assigned for the award, and if the parties request that the arbitrator not give reasons for his award - they must expressly and unequivocally stipulate this in their arbitration agreement.

Section P authorizes the arbitrator to apply to the court concerning legal questions that arise during the arbitration process, or submit the arbitration award, in part or in its entirety, to the court through a consultive case in order to receive an expert opinion. Section Q to the schedule grants the arbitrator the authority to make a declaratory award, mandamus or injunction, an order for specific performance and all other remedies which a court of law is authorized to order, including ordering of costs.

Chapter 2 - Matters of Arbitration

So that it be possible to submit a matter for arbitration under tha Arbitration Law, that matter must meet two cumulative conditions: **first**, the arbitration agreement, as a contract, must be valid, in that it not be disqualified under Section 30 to the Contracts Law (General Section); second, the arbitration agreement must be valid, in that the matter for arbitration can act as a subject for agreement between the parties.

Therefore, unlawful matters will not serve as subjects for an arbitration agreement. It is necessary to differentiate between an arbitration agreement that is unlawful in itself, and an arbitration agreement that is unlawfu in part. The first will be void by nature and the court will not grant it any validity. However, an unlawful agreement will not be annuled in any case, and Sections 30-31 to the Contracts Law (General Section) even permit a balance between the obligation to honor agreements and upholding the rule of law. Occasionally, it is possible to validate an agreement made in an unlawful matter, for

example by obtaining a license or when it is possible to separate - through the "blue pencil" doctrine - between the lawful and unlawful parts of an agreement.

Section 3 to the Arbitration Law dictates: "An arbitration agreement in matters which cannot be the subject of an agreement between the parties is invalid". For example: a constitutional matter, any matter where the decision is reserved for the State, or where authority to approve legal action is granted to the State, is not eligible for arbitration, criminal matters, matters of citizenship, etc.[13]. Therefore, even when an arbitration agreement has been signed in such a matter, the agreement is rendered void and the arbitration proceeding, including any decisions given there under, is likewise void.

The following matters have been discussed in case law precedents and have been determined eligible for arbitration:

1. Real estate ownership, distribution and leasing;
2. Intellectual property;
3. Familial business disputes;
4. Dissolution of partnerships;
5. Non-cogent labor relations - an employee who serves as a partner;
6. Arbitration under Section 191 to the Companies Law, except in the event of a public company;
7. A person charged with fraud (in civil proceedings) who has opted to pursue arbitration;
8. An arbitration clause in an agreement signed with the State prior to its establishment.

The matters which may not be submitted for arbitration are:

1. Applicability of the Open Court principle (clearing the name of a person in the same instance in which it was shamed);
2. Liquidation of companies;

[13] High Court of Justice Case 816/98 **Aminof and others v. Altalef and others**, Ruling 54(2) 769 (1998).

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3. Cogent employee rights;
4. Cases dealing with the discretion of an administrative authority;
5. Protected tenancy - cogent right;
6. "Grey"-area unlawfulness.

Chapter 3 - Annulment and Termination of the Arbitration Agreement

Pursuant to the provisions of Section O of the First Schedule to the Arbitration Law, an arbitration agreement shall terminate after the date prescribed for the award. However, The arbitration clause in an agreement does not terminate, and will still apply to other disputes.

The termination of the arbitration agreement can also be inferred from its abandonment. This, of course, refers to the parties abandoning the proceeding, or its abandonment by the claimant, as the claiment is entitled to repeal its claim, though it is not possible for the defendant to abandon the process when it is not going to its liking. In matters of arbitration too, a delay in the proceedings by either party may bring the court to decide that the artibration proceedings have been abandoned, in light of the importance given by the legislator and the judicial system to the speedy and efficient conduct of arbitration proceedings.

A dispute cannot be submitted for arbitration if the parties or the court have decided that the dispute is to be resolved in court. Furthermore, if the court has already ruled in the question which lies at the heart of the dispute, then not only will this award serve as an act of court, but the arbitration agreement will also terminate as regards that particular dispute. If the court has declined to issue a stay of proceedings, this means that the dispute will be heard in court, and the validity of the arbitration agreement shall terminate.

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Termination of the general agreement will not necessarily terminate arbitration. If the agreement has terminated, it is necessary to examine what has brought about such termination. According to the Contracts Law (General Part), it is possible to apply the "blue pencil" doctrine, i.e. - validate the contract by cancelling those clauses which render it void.

Should the arbitration clause, which is included in the agreement, remain valid despite the agreement itself being annulled? Precedence dictates that if the agreement has been anulled due to a defect in the intention of the contracting party, such as when he was decieved or misled in such a manner as caused him to undertake the agreement, the agreement is anulled in retrospect[14]. Therefore, the sub-provisions are also anulled, including the arbitration clause[15].

Chapter 4 - Appointment, Remuneration and Liability of an Arbitrator

The sections in the Arbitration Law which deal with the arbitrator's appointment are sections 8 and 9. The schedule to the Law also notes matters pertaining to the arbitrator's appointment, such as Sections A, B, and G. At this point we should note that under Section 21A, added under Amendment No. 2 to the law, all the powers granted to the arbitrator under the main law will apply to the arbitrator in appellation, *mutatis mutandis*.

Appointment by a Court of Law

If the parties have not decided on the arbitrator's appointment, or if a problem regarrding the arbitrator's appointment is encountered after the dispute arises, the litigants may apply that the court appoint an arbitrator. The court will appoint an arbitrator according to the terms set forth under Section 8(b) to the law.

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[14] Civil Appeals Case 248/77 **Hapoalim Bank Ltd. v. Garburg Ltd.**, Ruling 32(1) 253, pp. 257 (1977).
[15] Civil Appeals Case 445/80 **Jabra v. Bikat Beit She'an Regional Council**, Ruling 37(1) 421 (1983).

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The court is not obligated to appoint an arbitrator even if an application to do so has been submitted, as the court is granted discretion in this matter. In discussing the application, the judge will consider whether or not to appoint an arbitrator according to two worthy values[16]: the first, to grant effect and substance to the parties' contractual intent, as reflected in the arbitration agreement, and prevent the frustration of their mutual intent upon execution of the agreement. The second value is the encouragement of the arbitration institution, which constitutes an important and worthy alternative to deciding disputes which would ordinarily be decided in court.

May the court, in the name of streamlining proceedings, order the consolidation of arbitration proceedings? We believe that the court is not authorized to appoint an arbitrator under Section 8(a) to the Arbitration Law in violation of the arbitration agreement and its implications. The court is not granted the power to order that arbitration beheld under different terms than those agreed upon and may not add the arbitration of additional disputes which the parties did not intend to add to the proceeding.

When an arbitrator (or arbitrators) is unable to fulfill his duties, for example due to his retirement or a change in circumstances or in the relations between the arbitrator and the parties, the court, as dictated by law, will appoint another arbitrator in his stead. In such an event, the court will appoint an arbitrator of the same professional knowledge required of the arbitrator named in the agreement[17]. The court will only appoint an arbitrator after the applicant has met the requirements of Section 8(b). The court may appoint an arbitrator so long as the parties have not approached an arbitrator which they have agreed to appoint.[18] If the parties have contacted a person so appointed, and have found

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[16] Civil Leave for Appeal 10723/05 **E.E.C.E International Ltd. v. Gabai**, Supreme Takdin 2006(1) 4487 (2006), before Judge Procaccia.

[17] Misc. Civil Applications (Tel Aviv District) 8262/08 **Mendelson and others v. Yaacov and Elazar Avrahami Construction Company Ltd. and others**, District Takdin 2008(2) 9630 (2008).

[18] Civil Appeals 614/79 **The National Tourism Office - Litoural (Romania) v. Tour-Olam Ltd.**, Ruling 34(4) 617 (1980), and see also Misc. Civil Applications (Tel Aviv District) 25709/06 **Capala Computers Ltd. and others v. Nippon System Ware Co. Ltd.**, Pador 07(35) 487 (2007), Misc. Civil Applications 26476/06 (Tel Aviv District)

that person to be unfit for their trust, the court may appoint an arbitrator on its behalf.

When the disputes have arisen during the effective period of the agreement, but have led to legal recourse only after the end of the agreement period, the arbitration clause will apply and be enforceable. If the grounds for the clam were formed after the termination of the agreement and, under the arbitration agreement, the partes have decided that the arbitration shall apply to disputes arising from the agreement, the clause shall remain in effect even if the agreement has expired. In order to avoid expanding the scope of the arbitration clause under such circumstances, it is necessary to state in the agreement that the arbitration clause shall only apply to disputes that have arisen during the agreement period.

The application to appoint an arbitrator will be submitted to the court in those cases where no arbitrator has been appointed or where the parties have not agreed as to the identity of the arbitrator who shall resolve the dispute. The competent court of law is the district court, but if a different court has referred the litigants to arbitration, the request should be filed with the referring court.

Once the arbitration proceedings have commenced, neither party to the arbitration is entitled to repeal its consent to submit the dispute to that particular arbitrator, even if only one session has been held. The first arbitration session does not serve for introduction and forming of impressions, but is a material arbitration session for all intents and purposes.[19]

Appointment by a Third Party

In the majority of cases, only one arbitrator will be appointed. On rare occassions, the parties decide to appoint a number of arbitrators to resolve disputes. The arbitrator is appointed by the disputing parties when there is no

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Roubin - Landsman Building Engineering Ltd. v. Rotem Shani Development and Investment Ltd., Pador 07(11) 299 (2007), see also Section 8(b) to the Law.

[19] Originating Motion (Haifa District) 235/02 **Carmiel Wood Works Ltd. v. Angle Commercial Center Ltd. and others.** (February 29, 2004)

disagreement between them regarding the arbitrator's appointment. Sometimes, the parties to the agreement (or to the arbitration clause) decide that the arbitrator be appointed by an institution, such as the Israeli Bar, the Israeli Institute of Commercial Arbitration, the Association of Contractors and Builders in Israel, etc. Appointment of an aribtration which was not through the litigants' agreement detracts from the arbitrator's authority, and provides grounds for his dismissal. Third party appointments offer both advantages and disadvantages. On the one hand, the third party can appoint the most professional and suitable arbitrator to decide the dispute when the dispute has already arisen and the parties are unable to reach an agreement in the matter. On the other hand, occassionally, the third party is not fluent in the finer aspects of arbitration law and may be negligent in its appointment.

Types of Arbitrators

Specific arbitrator - The parties to the proceedings may agree to submit their dispute to arbitration provided that only a specific arbitrator hear the dispute, whether due to special trust that the parties have in that particular arbitrator or because of a special position that he holds. If that specific arbitrator is unable to hear the dispute - the parties shall not submit their dispute to arbitration. The parties' intention to follow this route must be explicitly expressed in writing in the arbitration clause.

Arbitration by two arbitrators, one chosen by each party - In this kind of arbitration, each party appoints a trusted arbitrator. In practice, very few arbitration proceedings follow this method, which entails substantial financial expenditure and, which we believe, complicates the proceedings.

Additional arbitrator or umpire - In arbitration where each party choses an arbitrator, or when the parties have appointed two arbitrators and these cannot reach an agreement, the parties may appoint an umpire. The answer to the question of whether the parties have agreed to appoint a third arbitrator who will himself decide the dispute or an additional arbitrator so that the three

arbitrators will decide the matter together - is not clear. It is sometimes difficult to differentiate between another arbitrator and an umpire, and lacking any agreement in the matter, this can have far-reaching consequences once the award is given. The Supreme Court has ruled that upon appointment of an umpire, the arbitrators appointed by the parties are bereft of judicial authority. They can continue to serve as "formal" arbitrators, or become representatives on behalf of the parties that appointed them. In any case, they cannot benefit from both worlds: both regard themselves as arbitrators for all intents and purposes with judicial authority, and that each arbitrator will represent the party which appointed him. When the third arbitrator is appointed as an additional arbitrator and not as an umpire, the other arbitrators keep their judicial role,and the three arbitrators together form the arbitration tribunal.

Arbitrator and quasi-arbitrator - The legal classification of the position is important in several aspects, including for determining the laws that govern the process and the rules derived therefrom, as well as determining the scope of the court's supervision over the arbitrator.[20] Court rulings did not always differentiate between an arbitrator, a quasi-arbitrator, and an assessor. There are those who view the arbitrator as someone who must decide a dispute after clarifying the facts and hearing the parties' arguments An assessor, on the other hand, only acts according to his specific skills and expertise, and can even forego hearing the parties' arguments, as he does not serve a quasi-judicial purpose. Case precedence determines four tests for determining if a person is acting as an arbitrator or a quasi-arbitrator. These tests are as follows: (a) an arbitrator deals with an existing dispute, while a quasi-arbitrator does not resolve any dispute, and the possible dispute is only a by-product of the decision. (b) a quasi-arbitrator does not impose obligations on the parties, while an arbitrator has the power to impose financial obligations. (c) an arbitrator has the authority to collect evidence and conduct judicial hearings, while a quasi-arbitrator is expected to carry out his examination according to

[20] Originating Motion (Jerusalem District) 4377/05 **Arim Urban Development Company Ltd. v. Barad Earthworks Development and Road Company**, Pador 07(5) 732 (2005).

his best professional judgment. (d) usually, though not necessarily always, in arbitration proceedings, the parties are represented by attorneys, while when appearing before a quasi-arbitrator, they do so without representation.

Choosing an arbitrator according to his profession - It can be assumed that the parties appoint an arbitrator who is suitable in terms of attributes and experties to decide the dispute, and therefore trust the arbitrator as having the knowledge necessary to decide the dispute. For example, the condition that the deciding arbitrator be a reliable, seasoned attorney in Israel indicates that the parties have considered the arbitrator's legal expertise of great importance, and desired that the resolution of their dispute be based on legal conditions. Therefore, the attorney must be completely fluent in Israeli law.

Arbitrator's Liability and Remuneration

Litigants must pay the arbitrator's remuneration and expenses at the times prescribed, if no other intention is implied in the arbitration agreement. Litigants may also pay the arbitrator an amount whose payment is due from another litigant and is in arrears, and these litigants will be entitled to repayment from such other litigant to an amount corresponding to the amount paid (Section 31 to the law).

The court, at a litigant's request, ma reduce the remuneration determined by the arbitrator to which the litigant does not agree, if the court deems such remuneration excessive and the court may further order the return of amounts paid to the arbitrator as remuneration. These, so long as the arbitration agreement does not imply any other intent. The court will not need a request for reduction of remuneration filed prior to the the arbitration award being made or after the period prescribed under Section 27(a) to the Arbitration Law. When the arbitrator has been relieved of his duties, the court, at a litigant's request, may determine whether or not the arbitrator is entitled to receive remuneration, in its entirety or in part. The court may further order the return of amounts paid to the arbitrator as remuneration..

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If the arbitrator's remuneration is not paid, in full or in part, on time, the arbitrator may suspend the proceedings and the issue of the arbitration award until payment of the amount due.

In such requests as aforesaid, the arbitrator will be the respondent and the other litigants will be given ample opportunity to present their argument. The competent court authorized to hear matters partaining to the arbitrator, such as the arbitrator's appointment, fees, dismissal, etc., will be the district court (and in labor cases - the labor court). The court's decision in these matters, like all decisions handed down by the court under the Arbitration Law, can be appealed with leave to the Supreme Court.

The Arbitrator's Responsibilities

Duty of loyalty - An arbitrator who has agreed to his appointment must act towards the litigants with loyalty. If the arbitrator breaches the trust that the parties have put in him, the damaged party, in addition to all other remedies prescribed under the Arbitration Law, is entitled to damages granted for breach of contract.[21] The status of the duty of trust borne by the arbitrator is more substantial than the duty of good faith to which all persons are subject when carrying out legal action.

Liability for damages - Section 8 to the Torts Ordinance [New Version] - The Torts Ordinance grants immunity to a judicial official, including arbitrators, as regards any wrong caused through the fulfillment of their judicial duty. This is not a complete waiverof substantive liability for damages, but rather a procedural barrier barring the enforcement of such liability through claims.

Claims against an arbitrator or proceedings for cancellation of an arbitration award or for dismissal of an arbitrator - There may be cases where the arbitrator will not be dismissed, the award will be duly approved by

[21] Section 30 to the Law.

a court of law, and it will still be possible to sue the arbitrator if he violated his duty of trust. A claim filed against an arbitrator under Section 30 to the Arbitration Law is not contingent on the arbitrator's dismissal or the cancellation of his award.

Chapter 5 - The Arbitrator's Powers

The argument regarding the lack of the arbitrator's authority to hear a dispute due to his improper appointment must be voiced as early as possible in the proceedings, and litigants should not wait until the award is handed down until filing an application for anulment of an arbitrator's award. Although it is possible to argue for lack of specific authority at any stage of the proceedings, voicing this complaint at the summations stage will not be accepted and considered bad faith on the part of the party voicing such argument.[22] Moreover, waiting until the end of the arbitration proceedings until arguing for lack of authority, may cause the outright rejection of the argument due to delay and bad faith.

Is the arbitrator authorized to decide on the scope of his authority? Is the court authorized to do so, or perhaps the parties? Which of these options is the most desireable? Generally speacking, the arbitrator is not authorized to decide on the validity and interpretation of the agreement, and jurisdiction in these matters is given to the court. The arbitrator is not authorized to determine whehter or not the arbitration agreement has gone into effect. However, it is commonly accepted that the arbitrator may refer to the facts based on which the argument regarding authority is made, and to discuss these facts.

If the arbitrator find himself in a situation where he does not know whether or not he is may decide regarding his authority to hear the dispute, he may approach the court through consultive case proceedings. The party disputing

[22] Civil Appeals 322/81, 323 **Yanay v. Yahiya**, Ruling 36(4) 365, pp. 375 (1982); Civil Leave for Appeals 11183/02 **Kalfa v. Zehavi**, ruling 58(3) 49 (2004).

the arbitrator's authority may suggest that the arbitrator pursue consultive case proceedings or itself approach the court and request a declaratory judgment, or afterwards - request anulment pursuant to Section 24 to the Arbitration Law.

The parties, through their conduct, may extend the arbitrator's authority beyond that set forth in the arbitration agreement, and they are not obligated to execute a new arbitration agreement to this end.

Chapter 6 - Removal of an Arbitrator

According to Section 11 to the Arbitration law, the court may remove an arbitrator under one of the following circumstances: (1) it is discovered that the arbitrator is unworthy of the parties' confiedence; (2) the arbitrator's conduct in the course of the arbitration causes a delay of justice (3) the arbitrator is unable to carry out his duties. The considerations at the basis of the decision to remove an arbitrator are no different from the considerations for disqualifying a judge. Like judges, the arbitrator must be a person of integrity and act without prejudice. The test determined by court rulings for prejudice and conflict of interests is an objectie test whereby real concerns for prejudice must be proven objectively,[23] and the subjective feelings of either party shall not suffice.

The duties of trust, which originate in the duty of loyalty prescribed under Section 30 to the Arbitration Law, obligates the arbitrator to report at the first instance any conflicts of interest or facts which may cause concern for conflict of interests and which may affect the arbitration proceedings or their outcome.

We believe that when discussing the dismissal of an arbitrator, the court must consider the timing in which the argument for incompetence is raised, in order to assess the extent of the applicant acting in good faith. The earlier that the argument is made, the more the court will lean towards giving it greater

[23] Civil Appeals 7298/00 **Basat v. Hamami and others**, Supreme Takdin 2003(2) 2161 (2003), and see also Meir Shamgar "On A Judge's Incompetence Due To Friendship" **Essays in Honor of Shimon Agranat** 87 (5757).

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weight. However, if the argument is made at a later stage, it willbenecessary to check if it is no more than an attempt to misuse the argument for incompetence. An arbitrator's dismissal is a grave matter and raises concerns for causing grave damage to a person's reputation.

The respondent to the application is the counter-party in the arbitration proceeding. Therefore, the arbitrator is not given a legal status in the application for his dismissal. This, despite the arbitrator being at the center of the application, and his exposure, no right to plead, to tendentious criticism which may damage his reputation. This state of affairs presents a true challenge and even deters persons from serving as arbitrators. Therefore, it is only appropriate to allow the arbitrator to appear as an active respondent (as opposed to a merely formal respondent) in applications aimed at his dismissal. This, so as to afford the arbitrator the possiblity of defending himself personally, instead of therough another respondent who is a litigant in the arbitration proceedings.

The parties may stipulate according to Section 11 and determine in the agreement that they will not file any application with the court, nor voice any arguments pertaining to the arbitrator's dismissal.

The time for filing the application for the arbitrator's dismissal ends with the arbitrator making his award. The date of the arbitrator signing the award (and not the date of its hearing) is considered the day on which the award is given. Once the arbitration proceedings have ended, the grounds provided under Section 11 to the Arbitration Law as regards the arbitrator's dismissal shall cease to exist.

The Arbitrator Is Not Worthy of the Parties' Confidence

The arbitrator's duty of disclosure - In this regard we should clarify that an arbitrator - as far as conflict of interests is concerned and the conduct of the arbitration proceedings - must act like a judge. The arbitrator may not meet

with one of the parties or converse with them. It is appropriate that the arbitrator make it clear, in the first arbitration session, that he is not to be contacted, neither directly nor through the secretariate, without the other party's knowledge. If the arbitrator is contacted, such contact must be made in writing with a copy servedto the other party, as is the case when contacting the court. No meetings should be held by the arbitrator and either party without the other party being present. In the event of a chance meeting, the arbitrator should give written notice to that effect to the parties' representatives, and will disclose the circumstances of the meeting, and if any words are exchanged (though this should be avoided) the other party will be notified of the content of this exchange.

The arbitrator's ties with the parties' attorneys - When dealing with strictly professional ties between law firm of a party to the arbitration proceedings and the arbitrator, there is no ground for disqualifying the arbitrator.

Disciplinary complaint against an arbitrator who is an attoreny - If a disciplinary complaint is filed against an attorney, then so long as the disciplinary tribunal has not decided on that attorney's temporary suspension, the arbitrator's fitness for the position is not affected. Moreover, under these circumstancs, the attorney is not obligated to notify clients requesting his services of his accusation. This rule shall also apply when parties to arbitration proceedings request that the attorney act as arbitrator on their behalf.

Disqualifying an arbitrator who has prepared a contract for one of the parties - Attorneys who appoint themselve as arbitrators for hearing matters arising from contracts that they have prepared for the parties or for either of the parties, create good grounds for anulment of the arbitration award. Nor can one ignore the litigant's discomfort regarding the arbitrator's objectivity after the latter has represented the interests of the other litigant.

Conflict of interests and prejudice - Th court has received an application to disqualify an arbitrator, despite the arbitration agreement signed by the parties,

due to the arbitrator's business ties with one of the parties. This, after doubt remains regarding the veracity of the arbitrator's claim that he has notified the parties of his business ties. This will suffice to dismiss the arbitrator due to the great emphasis place on appearances and their effect on the integrity of the proceedings and the parties' trust in the arbitrator and in the arbitration institution.[24] The appointment of an arbitrator who has served as an accountant for the company which is the object of the dispute and who has been summoned to testify - shall also be anuled.

An arbitrator will be dismissed if it be found that he has represented one of the parties and has rendered legal services to that party or to companies controlled by the manager of one of the parties. Personal familiarity by the arbitrator or by any of his associates with the litigants will not serve as grounds for automatic disqualification.[25] An arbitraor who has stated a legal position, detracts from the guiding principle that justice be made and seen. The judicial review that has formed over the years regarding the considerations for a judge's disqualification, shall also apply to considerations for the disqualification of an arbitrator.

The Arbitrator's Conduct During the Arbitration Proceedings Causes Delay of Justice

It is possible to dismiss an arbitrator due to his delay in making his award in the arbitration proceedings for a period of more than three years.

Occassionally, the impression is formed that the arbitrator leans towards one of the parties. Examples of this can befound in decisions regarding the conduct of the arbitration proceedings, such as: decisios banning investigations or restricting investigations; requiring that the applicant provide its questions to an expert in advance. These types of decisions are detrimental to a litigant. They may be construed as hostility, and cause that litigant to apply for the

[24] Civil Case (Haifa District) 141/04 **A.D.M. Developers Ltd. v. Loki Project Implementation (Construction) 1989 Ltd.** (not published, March 24, 2004).
[25] Civil Appeals 7298/00 **Basat v. Hamami**, Supreme Takdin 2003(2) 2161 (2003).

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arbitrator's dismissal. However, the arbitrator's status and authority demand that the arbitrator react to his decisions being ignored. Otherwise, control over the arbitration proceedings will pass from the arbitrator to the litigants, and each party will do as it pleases.

An Arbitrator Who Resigns

In light of Section 75 to the Courts Law [Consolidated Version] and in light of Section 11 to the Arbitration Law, despite the weight given to the arbitrator's decision, his opinion is not decisive. The arbitrator's consent to fulfill the duties of his position includes a component of ending the arbitration in an efficient and just decision, and the arbitrator is not free to resign whenever he is subjected to pressure from either litigant. The court may instruct the arbitrator to return to the arbitration proceeding and finish it with an arbitration award. Furthermore, the law does not grant the arbitrator the authority to repeal his resignation, even after a short period of time. Therefore, after notice has been served of the arbitrator's resignation, a "constitutive act" is required for appointing an arbitrator, whether the previous arbitrator is appointed, or a new one.

If the position of arbitrator has fallen vacant following the arbitrator's resignation or death, or following his dismissal, the court will appoint a substitute arbitrator. Is the court authorized, under Sections 8 and 12 to the Arbitration Law, to appoint a replacement arbitrator when the arbitrator named in the arbitration clause has refused his appointment? In this matter, full consideration will be given to the parties' intention, which can be inferred from the wording of the arbitration agreement, and from the circumstances in which that agreement was made.

Chapter 7 - Arbitration in Hebrew Law

In the story of Jethro, in the book of Exodus, Jethro, Mozes' father-in-law, proposes that a hierarchal legal system be established, with a court hearing simple matters,a court hearing complicated matters - and a supreme instance, which shall hear only the complicated matters, which will be submitted for decision by Mozes, the nation's prophet and leader. This is the beginning of the legal system establishing additional instances. Out of necessity, a judicial system of arbitrators developed in the Diaspora as well. As a clear expressionof the religious and nationalistic nature of Hebrew law, it was strictly forbidden to litigate in Gentile courts. Approaching a Gentile court was considered utter heresy and blasphemy. The ban on litigating in Gentile courts, aimed at preserving Jewish judicial autonomy, led the scholars of the Halakha to establish additional judicial institutions, such as arbitration and the layment courts, on their various forms.[26]

With the establishment of the State of Israel, that system which evolved from the principles of Jewish Law was established alongside the civil court system - the Rabbinical courts. The Rabbinical courts too include arbitration proceedings which have always granted the right to appeal the arbitration before the High Rabbinical Court. Except that this process has its disadvantages: an arbitration award like any arbitrator award, made by the Rabbinical court convening as a tribunal of arbitrators, is only enforceable in judiciary execution after being approved by the district court, in the same manner as the district court approves all arbitrator awards pursuant to the Arbitration Law. Furthermore, the ability to review the arbitrator's award is also given to the district court, which is obligated to the grounds for cancellation set forth in Sections 24 and 26 to the Arbitration Law. Therefore, proceedings in the Rabbinical court, pursuant to the Arbitration Law, perpetuate a state of affairs where a judicial body is subject to external, limited judicial review. It should be emphasized, that the High Rabbinical Court's appellate review is of no avail, as we are dealing with review by the civil legal system which is required, in light of the special nature of the religious system, and the Great Rabbinical Court is granted no exception due to its status. It constitutes an integral part of the judicial system in Israel.

[26] Assaf Porat **The Rabbinical Court As Arbitrator** (published in Nevo); Menachem Alon **Jewish Law - History, Sources, Principles** Vol A 1-6 (expanded and amended 3rd edition, 5758).

As aforesaid, the Arbitration Law (Amendment No. 2), 5768-2008, allows for judicial-appellate review of arbitration awards given in the civil system.

Section 2 - Judicial Process and Appeals

Chapter 8 - Procedure and Evidence

Under arbitration law, the arbitrator and the parties are not obligated to follow the procedures common in a court of law. The parties and the arbitrator may prescribe dates at their convenience, the location where sessions will be held, decide whether arguments and testimony will be submitted orally or strictly in writing, and so forth. These attributes reflect the advantages which characterize the arbitration process - namely the quick resolution of disputes.

Arbitration procedures related to court procedure are prescribed under the Arbitration Procedure Regulations, 5728-1968 ("the Arbitration Regulations"). As far as it not be provided otherwise, Regulation 2 to the Arbitration Regulations dictates that the Civil Procedure Regulations, 5744-1984 will apply to arbitration-related court procedures. Following the Arbitration Law (Amendment No. 2), 5769-2009 ("Amendment No. 2"), additional procedures were added which apply to the arbitrator in an appeal. These additional procedures were set forth in an addition entitled: "Second Schedule (Section 21A)". One of the obvious innovations instituted under the amendment deals with the obligation to provide explanations: Under Section 21A(a), if the parties to an arbitration agreement have determined that the arbitration ruling will be appealable before an arbitrator - the arbitrator hearing the dispute will provide explanations in the appealable arbitration ruling. Furthermore, the provisions of the Second Schedule will apply **in addition** to the provisions of the First Schedule, so long as they do not contradict the provisions of the Second Schedule - unless the parties have determined otherwise.

Summons to Arbitration

Section D to the First Schedule to the law dictates that the chairman of the arbitration proceedings may decide the location and dates of the arbitration sessions. In practice, upon his appointment, the arbitrator must begin determining the dates for the hearings, from the moment he accepts his appointment, as is the case in court when an action is brought before it. The formal summons to hearings will be made as per the litigants' agreement, verbally or in writing. Summons can be sent by any means of communication: by fax or by email, but the preferred method is by way of registered mail with confirmation of delivery, which constitutes proof as to the summons' delivery to the litigant. Next, the parties must send their pleadings to the arbitrator, each in turn as per the parties' convenience or as dictated by civil procedure.

Arbitration Sessions

Pre-arbitration - This is a preliminary session which may prove to be quite effective. This is the first time that the parties are meeting after the dispute has arisen, where they sit at the same table, and it is necessary to ensure that the atmosphere in the meeting is relaxed. In this meeting, it is possible to present the litigants with personal questions pertaining to the dispute in a pleasant and informal manner.

The first hearing - In the first hearing, the parties will summarize the following: 1. execution of an agreement; 2. a list of disagreements and the matters requiring decision; 3. selection of the arbitration route; 4. the arbitration tribunal; 5. the arbitrator's powers; 6. dates; 7. location for the meetings; 8. documentation of the arbitration process; 9. the deadline for the ruling.

At this stage, and according to the Arbitration Law (Amendment No. 2), the disputed parties may choose their arbitration route.

a. They may follow the procedure used prior to Amendment No. 2 to the Law. If the parties opt to pursue this route, they will be entitled to review the arbitrator's ruling only on the grounds for cancellation provided in Section 24 to the Arbitration Law.

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b. The parties may also opt for one of two new methods instituted under the Amendment: they may follow Section 21A to the Law, entitled "Appeals Before An Arbitrator". In this case, the arbitrator is subject to a cogent obligation to give grounds for the arbitration award. Lacking this explanation - there would be nothing on which to base the appeal. The dates for the arbitration procedure under this route are dictated by the Second Schedule to the Law, and include the dates for filing the appeal and counter-appeal, as well as the dates for deciding the appeal. The parties will determine the composition of the appellate instance: one single arbitrator or any other composition that they choose. Appeals under this route will therefore be heard outside of court. The decision regarding the appeal will effectively serve as the arbitration award.

Cancellation of the arbitration award under this route will only be possible under two rare and extreme conditions: according to the grounds for cancellation provided under Section 24(9) or Section 24(10) to the Arbitration Law.

c. The parties may determine that it be possible to obtain leave to appeal the arbitration award before a court of law. This route offers litigants - who are so interested - a process of obtaining leave to appeal to the court, and obtaining an arbitration award based on substantive law, on the provisions of law and on court rulings. The appeals process, as aforesaid, will be permitted with leave and will be heard by one judge. Here too, the arbitrator has a duty to give grounds for his award, and is further obligated to document the arbitration sessions in minutes, as mandated under Section 29B(b) to the Law.

Scheduling sessions - It is preferable for the sessions to be held in as neutral a location as possible. The arbitration proceedings can be held in the arbitrator's home or office, or in a place rented for that purpose. The arbitrator's job is to ensure the continuity of the arbitration sessions.

Attendance in the arbitration sessions - The informal nature of the arbitration proceedings may cause some people to feel comfortable with not attending sessions,

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without giving notice of their absence and without giving just cause for their non-attendance. In this case, Section J to the addition to the law and Section 15 to the law provide the sanction of conducting the session in the absence of the party who failed to appear. If that party that failed to appear was to present its arguments in that session, the arbitrator may decide the dispute in his absence. It is not possible to conduct arbitration proceedings in the absence of a party which failed to appear, unless the arbitrator has given prior written or verbal warning to that party that he shall do so. A party wishing to deny the authority of the arbitrator and the arbitration proceedings, may avoid appearing in hearings, and the arbitrator, despite his warnings, will not be able to do anything about it. However, it is important that the litigant give written notice of his denial of authority. We believe that it is necessary to borrow from civil procedure those sanctions employed against a party for their failure to appear for hearings, and to expressly state these sanctions in the arbitration agreement.

The arbitrator may annul an arbitration award given after a hearing held in the absence of a party or without a party's arguments being heard, if the following conditions are met: (1) the litigant filed an application to the arbitrator within 30 days of receiving a copy of the arbitrator's award; (2) the litigant was absent form the hearings or did not present his arguments for good cause. When dealing with schedule extension in court, the court will accept reasons which are based on circumstances where a litigant is unable to fulfill his duties, and which circumstances are outside his control. We believe that similar grounds should apply in arbitration.

The litigants may suffice with their attorney's attending the hearings, if the parties did not decide in advance that representation by attorney not be allowed or that attendance will be mandatory.

Holding separate sessions - Holding separate sessions, individually, with one of the parties, is not possible unless the parties have explicitly agreed to permit such conduct. Therefore, if an arbitrator meets with one of the parties to the arbitration process, and the parties did not agree to permit such meetings, the arbitrator will not be able to rectify such defect by meeting with the other party. The arbitrator must make sure to maintain the appearance of justice, and if he meet individually with one of the litigants without the

other party's knowledge - such action will constitute grounds for the arbitrator's removal under Section 11 to the Arbitration Law.

Failure to ensure that sessions are held - Arbitration can be held without adhering to session procedures. Arbitration proceedings where a minimum level of formality is not maintained indicates a lack of professionalism and can be risky. The arbitrator must see to it that the arbitration proceeding be conducted in a manner that respects both parties and grants the process itself its due status.

Documentation of Meetings

Under ordinary arbitration proceedings (where the parties did not agree to an appellate instance as per Sections 21A and 29B), there is no obligation to keep minutes of sessions and testimony. However, it is only fitting that all judicial and quasi-judicial proceedings be documented by minutes that will reflect the main points of the proceedings.

In arbitration proceedings held under Section 21A to the Law ("Section 21A" or "Appeals Before An Arbitrator"), Section A to the Second Schedule determines, for appeals before an arbitrator, that arbitration sessions be documented in minutes or by any other means determined by the parties under the arbitration agreement. The documentation provision's location in the Second Schedule indicates that it can serve for stipulation. We believe, that the nature of the process and the arbitrator's obligation to provide explanations under Section 21A(a)(1) mandate that arbitration proceedings be documented.

In arbitration under Section 29B to the Law, one of the conditions for holding the arbitration process is documentation of arbitration sessions in minutes, as set forth under Section 29B(b) to the Law. In this section, the obligation to document hearings in minutes is cogent. The reason for the obligation to document hearings in minutes has to do with the appellate nature of the arbitration proceeding under Section 29B to the Law.

Pleadings

Outright dismissal of claims - An arbitrator may order the outright dismissal of a claim if he believes it justified under the circumstances and if the statement of claim does not

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meet the conditions prescribed by civil procedure for submitting statements of claim.[27] We can identify two circumstances in which a claim will be dismissed: first, striking out the claim, and second, rejecting the claim. Each of these cases leads to different outcomes.

Striking out the claim - Under Regulation 527 to the Civil Procedure Regulations, 5744-1984 ("the Civil Procedure Regulations" or "the Regulations"), striking out a claim does not constitute an act of court and shall not prevent the claimant from filing a new claim based on the same grounds. Grounds for striking out claims are as follows: (1) the statement of claim does indicate grounds for a claim. In cases where the grounds for the claim is not indicated in the pleadings, but the claim can be saved through amendment, the arbitrator must be forthcoming and allow the claimant to amend and re-submit the statement of claim. (2) the statement of claim indicates that the claim is pestering.[28]

Rejecting the claim - The arbitrator may instruct that the claim be rejected in cases where the court is authorized to order such rejection under Regulation 101(a) to the Civil Procedure Regulations. Rejection of a claim constitutes an act of court and that claim cannot be re-submitted. A claim can be rejected when there is an act of court, in which another claim was previously submitted on the same grounds, and which claim was deliberated and decided by a competent instance, including by another arbitrator. Continued hearing of a claim whose circumstances include an act of court or any other grounds for its rejection, serves as good grounds for the arbitrator's removal, and good grounds for annulment of the award under Section 24(10) if the litigant becomes aware of the matter after the award is handed down.

Form and order of submittal of pleadings - Pleadings will be submitted in writing. The claimant will submit his claim, the defendant will submit his statement of defense, and the claimant will submit a statement of reply. If the defendant wishes to sue the claimant, he will submit a statement of counter-claim. The pleadings can be submitted through affidavits. Of the arbitrator decides to institute other, more efficient procedures, he must

[27] For more information see: Uri Goren **Issues in Civil Procedure** 163 (9th edition, 2007).
[28] Regulation 100(2) to the Regulations.

make sure to uphold these so as not to appear prejudiced in favor either of the parties to the arbitration, through changing the procedure during the course of the arbitration proceedings.

The dates for submitting the pleadings - The dates for submitting the pleadings in arbitration are not prescribed by the Arbitration Law or the regulations enacted there under. We believe that this is due to the complete autonomy granted the parties to determine the course of the arbitration through their arbitration agreement, or to choose whether to give the arbitrator the authority to determine the dates for submitting the pleadings, according to the parties' own preferences. It is possible to adopt the dates prescribed for submitting pleadings according to the Civil Procedure Regulations, which are: 30 days for submitting the statement of defense, and 15 days for submitting the statement of reply.

Amending pleadings - An arbitrator may grant a litigant's request to amend his pleadings if, following a session attended by both parties, or after reviewing their written arguments, the arbitrator shall find it appropriate to do so. The arbitrator will decide to amend the plead only if he be convinced that the requested amendment will no create a distortion or delay of justice for the respondent, or that the necessary balance between the justness of the request and the lengthening of the proceedings that it is expected to cause can be compensated financially. The arbitrator must check, prior to making his decision in the matter, whether or not he has been authorized under the arbitration agreement to permit the amendment of the plead.

Affidavit - An affidavit submitted as a plead will be submitted as follows: the affidavit - whether the claimant's affidavit or the defendant's - will be written in the first person. It will include both the legal arguments and the remedies argued by the declarant. In many cases, arbitration proceedings are held without pleadings and without affidavits. Arguments may be presented verbally, so that immediately after presentation of the dispute, it is possible to hear witness testimony and the summations. This type of arbitration is intended to be fast and efficient when the dispute is focused in one, clearly defined field.

In arbitration proceedings, where the parties have agreed that main testimony be given by affidavit, it is possible to forego the pleadings. Experience shows us that litigants, justly, tend to repeat in their affidavits the facts detailed in their pleadings.

Interrogatories and Production of Documents

Section H to the addition to the Law authorizes the arbitrator to order the litigants to fill out interrogatories, disclose and produce documents and take any action required for the purpose of the arbitration proceedings, as would a court of law in a claim brought before it. If necessary, during the first sessions of the arbitration process, the parties must ask the arbitrator's leave to submit interrogatories and disclose documents. If the arbitrator grants this request, his consent will be considered a binding order.

Interrogatories - The purpose of having the parties fill out interrogatories is to clarify the disputed questions and obtain statements. This, based on the assumption that if a litigant is required to state his arguments through affidavit, he will be more precise in stating his version. Litigants may use the answers to an interrogatory, or any part thereof, and present them as evidence.

Disclosure of documents - Under Regulation 112 to the Regulations, the obligation to disclose documents is met when a litigant details in his affidavit which documents are, or where, in his possession. However, the obligation for disclosure does not include an obligation to produce the documents to the other litigant, or to permit access to those documents. The date for submitting the request for disclosure of documents in arbitration is during the first sessions or within 30 days of submittal of the last statement of defense of statement of reply (the later of the two). If, after 30 days, the litigant to whom the demand for disclosure of documents has not respondent, such non-response shall be considered as refusal to disclose, and it will then be necessary to file a request with the arbitrator that he order the refusing litigant to disclose the documents. This request will be submitted no later than 15 days after the deadline for the litigant's reply.

The litigant must disclose documents which meet the following two criteria: the documents are, or where, in his possession or control; the documents pertain to the matter at hand.

Confidentiality - If a litigant believes that a document must not be disclosed due to reasons of confidentiality, that litigant must expressly argue for confidentiality, as otherwise he will be regarded as having waived this right. If the matter of the document's disclosure is disputed, we believe that the arbitrator may himself review the document and assess the difference between the facts as presented in the statement of claim, and the facts as appear in the disputed evidence. There are three main types of confidentiality: attorney-client privilege; confidentiality due to protection of privacy; confidentiality of commercial secrets.

Evidence and Exhibits

Evidence - The parties, by granting the arbitrator authority to decide their dispute, have also authorized him to determine the manner in which the arbitration proceedings will be held, and to make during the course of these proceedings various decisions pertaining to the manner in which the disputed matters will be clarified. The arbitrator is obligated to protect each party's right to voice its arguments and present its evidence, and this right is founded in natural justice. However, it is not always possible to meet this obligation. Therefore, it is recommended that the parties formulate an arbitration clause which refers to procedure and evidence.

Supplementation of evidence - As the arbitrator is not subject to the procedures common in court, nor to the rules of substantive law and evidence law, when the arbitrator believes that it would not be just to deny additional arguments for a litigant only due to the non-submittal of a document, which the arbitrator assumes that is in that litigant's possession, he may receive the evidence later, and the arbitrator will have sole discretion in his decision.

Witnesses - According to Section 13 to the Law, the arbitrator is authorized to summon witnesses to give testimony or present documents, and he may order fees and expenses for such witnesses. The restriction is that the court may annul these summons on the following conditions: **first**, if the witness has so requested; **second**, if the summons was made through abuse of the arbitration proceedings. Both parties must be awarded equal

opportunity to examine the witnesses and remark on their testimony, and so witness testimony should not be heard in the absence of a party. Witnesses must appear for the arbitration session, and moreover, the witness must cooperate and answer the questions posed to him by the litigants, their representatives or by the arbitrator. The witness's refusal may lead to exercise of contempt of court sanctions.

The arbitrator must warn the witness that "he must tell only the truth and the whole truth, and he shall be subject to those penalties prescribed by law if he shall fail to do so".[29] The arbitrator must make sure to give this warning, as testimony given without warning is liable to disqualification. It is fitting that in arbitration proceedings which the parties have decided that they be exempt from the procedures of law required in court, the witness will be examined in the order customary in court proceedings.

Confidentiality of testimony - Under the Evidence Ordinance [New Version], 5731-1971, witnesses may refuse to appear in arbitration proceedings on matters which may serve to incriminate them. Furthermore, if the witness is the attorney, doctor, social worker, psychologist, or priest of one of the parties to the proceedings, privilege will apply, and that witness will not be able to testify.

Expert testimony - According to the adversarial system of law, judges and arbitrators may appoint an expert, but are not obligated to do so, and the parties may call experts to testify on their behalf if they so wish. These experts will submit their expert opinion, and the parties may then examine them.

Consultative Case (When the Arbitrator Enlists the Aid of the Court)

The consultative case process is anchored in Regulations 234-239 to the Civil Procedure Regulations and in Section P to the addition to the Arbitration Law. The purpose of this procedure is to enlist the aid of the court which will give its opinion on a legal question that has been encountered during arbitration. This process is intended to aid arbitrators who do not have a legal background, and so cannot complete their task. There is

[29] Section 2 to the Evidence Amendment Law (Warning of Witnesses and Abolition of Oath), 5740-1980.

disagreement on whether the answer to the consultation is binding on the arbitrator, or whether it constitutes "advice" which the arbitrator is free to accept or reject.

Award consultation - Award consultations are submitted when a legal issue has been encountered on which the arbitration award depends. Award problems - as opposed to advice problems - can be reviewed by an appellate court. This is a consultation referred to the court after the arbitrator has completed his work and requested assistance regarding a legal question in light of his decisions in other matters which required decision. In this case, final decision is given to the court and not the arbitrator. Therefore, this is a judicial decision which can be appealed.

Advice consultation - In advice consultation, the arbitrator requests the court's assistance on a particular issue, the court discusses that issue, and returns it to the arbitrator for his final decision. Usually, the request will be related to the arbitrator's authority.

Temporary Relief In Arbitration

Temporary relief by an arbitrator - In general, the granting of temporary relief is intended to ensure the continuation of the circumstances which exist at the time when the claim was submitted. Otherwise, the defendant may abuse the litigation period. The courts have not given any unequivocal decision regarding the arbitrator's authority to grant temporary relief. The disagreement on the question of whether the arbitrator is authorized to grant temporary relief in arbitration proceedings focuses mainly on Section 16 to the Law, entitled: "Auxiliary Powers of Court". Section 16(a) includes a list of cases where the court is given the authority to grant relief in a claim brought before it. In this list, Section 16(a)(5) states the court's authority to grant relief in arbitration proceedings. On the other hand, Section 16(d) to the law dictates that the provisions of this section (including 16(a)) shall not serve to derogate from the arbitrator's powers "under the arbitration agreement or under this law" (i.e. - the Arbitration Law). This provision, which states "shall not serve to derogate", was intended to preserve the powers granted an arbitrator under the arbitration agreement or under the Arbitration Law.

We believe that, in certain cases, the arbitrator has full authority to grant temporary relief. It is true that Section 16 to the Law grants the court the power to issue interim injunctions, but it seems that these powers were not meant to be exclusive, as Section 16(d) to the Law state that they shall not serve to derogate from the arbitrator's authority "under the arbitration agreement or under this law". The aim of the Arbitration Law - to prescribe an alternative mechanism for court proceedings, which will ensure fast and efficient decision of disputes and will ease the load on the courts - justifies that the arbitrator's authority be interpreted expansively in order to uphold as much as possible the arbitrator's award.

Although it would have been appropriate for the legislator to state his opinion in the matter, and permit an application to the court for approving a temporary injunction issued in arbitration, but there is still one other remedy granted to whoever received the arbitrator's order, and that is applying to the court to receive an order matching the arbitrator's interim order, as the court is not authorized to approve a temporary injunction issued by an arbitrator in the same manner as it approves an arbitration award.

Temporary relief by court - Section 16 to the Arbitration law authorizes the court to grant temporary relief to litigants in arbitration. Regulation 2 to the Arbitration Procedure Regulations dictates that the civil procedure regulations will apply to court procedure pertaining to arbitration, so long as these regulations do not provide otherwise. Under Section 16 to the Law, application for relief by court is contingent on the existence of legal action. The Arbitration Law does not define what constitutes an "action", but we can assume that "action" also includes claims in arbitration.

The matters in which the court is granted auxiliary powers are as follows: summoning of witnesses, and determination of their remuneration and expenses; the adoption of coercive and punitive measures against a witness who has not answered an arbitrator's or the court's summons, or who has refused to testify; the taking of evidence forthwith or out of the jurisdiction; substituted service of notices or documents on the litigants; granting of temporary relief, such as the attachment of property, the of departure from

Israel, securities for the production of property, the appointment of a receiver, a mandatory injunction and a prohibitive injunction.

Under Regulation 362(a) to the Civil Procedure Regulations, in order for a temporary relief to be granted, the court must be convinced that there are alleged grounds for the claim. Furthermore, under Regulation 362(b), the court must balance the expected damage to each party. The court must also examine if the application was filed in good faith and if granting the relief would be justified under the circumstances and would not cause excessive damage.

As well know, the competent court for hearing matters of arbitration is the district court. However, sometimes the hearing is referred to arbitration by the magistrate court, which raises questions regarding the granting of relief. It is therefore important to clarify this issue in the arbitration agreement, so as to determine where matters regarding relief will be heard.

Pursuant to Section 17(a) to the Arbitration Law, temporary relief granted by the court will remain valid until the arbitration award is made, unless it is repealed by the court. At the end of the arbitration proceedings, if no need has arose to repeal or modify the temporary relief, the relief will become final. If, in his award, the arbitrator did not confirm the temporary relief as final, the temporary relief will immediately cease to be in effect. The Arbitration Law exempts litigants from applying to the court which granted the temporary relief.

Temporary relief for stay of the arbitration proceedings is deliberated by the court mainly based on the criteria common for temporary relief, although their application in this matter has unique characteristics which set the arbitration proceedings apart from other general issues regarding interim relief. In order to grant temporary relief to stay arbitration proceedings, special care must be given to apply the pre-conditions and examine their weight, which is derived from the nature and purpose of the arbitration system.

Temporary relief of attachment to guarantee foreign arbitration - When a foreign company contracts an Israeli company, and the arbitration forum is held outside of Israel, the court in Israel may grant temporary relief prior to the initiation of the arbitration proceedings. However, the granting of temporary relief shall not serve to derogate from

the arbitration clause determined by the parties or to interfere with the arbitration proceedings in matters agreed by the parties. We must also remember that temporary relief is "relief in equity", and the court has an innate authority to grant them according to evidence submitted to it.

Jurisdiction

Local jurisdiction - Under Regulation 3 to the Arbitration Procedure Regulations, applications pursuant to the Arbitration Law, except for applications for stay of proceedings, will be filed with the court located in one of the following: the respondent's place of residence or business; the location where the arbitration proceedings were held or are to be held; the location where the act which gave rise to the arbitration occurred; the court on which the litigants in arbitration have agreed. An application which has no prescribed jurisdiction under these rules will be filed with the court in Jerusalem. The court in Jerusalem may order that the application be heard elsewhere.

Specific authority - The Arbitration Law grants the judicial instances various rights aimed mainly at supervising the arbitration proceedings both during and after the arbitration process. The Arbitration Law sets forth matters which the court is authorized to deliberate, such as: stay of proceedings, request for appointing an arbitrator, removing an arbitrator, a request for assistance submitted to a court by an arbitrator, an application for temporary relief, an application for annulling an arbitration award and a request for leave to appeal the arbitrator's award. Under the definitions set forth by Section 1 to the Arbitration Law, "the court" is defined as the district court, except for the purpose of Sections 5 and 6. Meaning - the competent court will be the district court, but in those cases where an application for stay of proceedings is filed pursuant to an arbitration clause, other instances will also be granted authority.

Dates

Arguments regarding the arbitrator's lack of authority - Arguments regarding the arbitrator not having authority to hear the dispute must be voiced as early as possible, and the parties must not wait until the arbitrator's award is made to file an application to cancel the arbitrator's award.

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Submitting pleadings - The dates for submitting pleadings are not prescribed under the Arbitration Law, no under the Arbitration Regulations. We believe that this is due to the absolute autonomy granted the parties to determine the nature of their arbitration proceedings through their arbitration agreement or to choose whether to grant the arbitrator the authority to determine the dates for submitting their pleadings, at their convenience.

Application for an arbitrator's removal - The date for submitting the application to remove an arbitrator passes with the arbitrator handing down his award. The signature date of the arbitrator's award (and not the date of its hearing) will serve as the issuing date of the award.

Dates in appeal - Under Section B to the Second Schedule to the Law[30], the appeal will be submitted to the arbitrator within 30 days of the date on which the arbitration award was given to the litigants or from the date on which the arbitrator was appointed for the appeals process, the later of the two. The other litigants may submit a detailed reply to the appeal within 30 days of receiving the appeal. The appealing party may submit its response to the reply within 15 days of its submittal. The time-related provisions are set forth in the Second Schedule to the Law and so can be stipulated upon when formulating the arbitration agreement. The parties may stipulate and determine longer or shorter dates than those prescribed under the Second Schedule, as the aim of the arbitration institution in general, and of consensual arbitration under Section 21A in particular, is to conduct an arbitration process which matches the wishes and agreements of the parties.

As regards the extension of the date for filing an appeal in arbitration proceedings, the arbitrator's discretion should not be restricted solely to "special causes" (as is the case in court). This, due to two reasons pertaining to the nature of the appeals process before an arbitrator: the first, that the arbitration process pursuant to Section 21A is a process

[30] Section B to the Second Schedule: "The appeal will be submitted within three days of the date on which the arbitration award was given to the litigants or from the date of appointment of the appellate arbitrator's appointment, the later of the two, and will give grounds for the appeal; the other litigants may submit a detailed reply to the appeal within three days of the date of receiving the appeal; the appellant may submit a response to this reply within 15 days of its delivery."

whose procedure is dictated in the parties' agreement prior to the start of arbitration. Second, that though the arbitrator in the appellate instance does indeed have a quasi-judicial role, but he is not a judge, and in most cases his considerations whether or not to extend the date will not withstand review by the court.

The application will be submitted to the appellate arbitrator, and the considerations which must be made by the appellate arbitrator are; the period of time that has elapsed from the original date of appeal, what is the reason for the delay, to what extent did the other litigant rely on the assumption that failure to file the appeal on time indicates that his adversary has waived his right, or that the right granted the adversary has expired through his failure to act - and the arbitrator award held by that party is valid.

Application to cancel the award based on certain sections - Section 21A(c)(1) to the law includes a provision whereby, in certain cases, it is possible to submit an application to cancel an arbitrator's award pursuant to Sections 24(9) and (10) to the Law. The dates for filing these applications are the same as the dates for filing other applications for cancellation of the arbitration award pursuant to Section 24 to the Law. The application for cancellation of the arbitration award will be filed within 45 days of the arbitration award being made, or within 15 days of the date on which notice regarding the application for approval of the arbitrator's award was served to the respondent, and all within the total of 45 days.

Cessation of Arbitration

A party to the proceedings seeking to stay the arbitration process due to its inability to participate therein, e.g. - due to illness and that litigant presents documents supporting his request, the arbitrator may order the cessation of the proceedings and their continuation at such time as the relevant party may participate. We believe that the arbitrator must consider whether this is an attempt to evade the arbitration process. If a distortion of justice will be caused to the interested party, proceedings should continue.

Disorganized cessation of proceedings may have far-reaching consequences, as if a party has of its own volition ceased the proceedings and did not appear to present its arguments despite being summoned to do so, pursuant to Section 15(b) to the Law, the arbitrator may rule in the absence of that party.

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Chapter 9 - Stay of Proceedings

An application for stay of proceedings will be filed pursuant to Section 5 to the Arbitration Law. This section indicates that the application to stay proceedings will be made in those cases where a duly made arbitration proceeding has been executed between the two parties, which applies to the dispute.[31] The first party to the dispute has filed a claim to the court, while the second party has two options for litigating the dispute: the first, to continue litigation in court. The second, to litigate through arbitration before an arbitrator, without implementing the process of law common in court, and to do so quickly and efficiently without any undo expenses. If the second party has opted to pursue the second route, it may file an application to stay proceedings in the claim. The court will deliberate this application, and after hearing the parties' arguments, will decide whether or not to submit the dispute to arbitration. In general, if an arbitration agreement has been signed, the court will prefer to uphold this agreement and submit the dispute for arbitration. Under Section 5 to the Law, only one of the parties to the arbitration agreement may file an application to stay proceedings.

Under the definitions set forth in Section 1 to the Arbitration law, "court" is defined as the district court except for the purpose of Sections 5 and 6. Meaning - the competent court will be the district court. However, in cases where applications for stay of proceedings are filed pursuant to an arbitration clause, authority will also be granted to other instances.

Submitting the Application

[31] Until enactment of the Arbitration Law (Amendment No. 2), 5769-2008, it was possible to agree that arbitration proceedings not be subject to the procedure of law and without giving grounds for the award, and it was only possible to annul the arbitral award based on the grounds for annulment. Following the amendment to the law, two new arbitration routes were added - Section 21A - appeal before an arbitrator, and Section 29B - appeal on leave of the arbitrator's award before a court. Parties wishing to pursue arbitration through one of the new routes, may do so only with both parties' full written agreement. Therefore, we believe that the court will find it difficult not to stay proceedings when the parties pursue arbitration in one of these routes through full agreement.

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Section 5(b) to the Arbitration Law dictates: "An application for a stay of proceedings may be submitted in the statement of defense or otherwise". It is not possible to apply for stay of proceedings, unless a claim has been filed against the party applying for stay of proceedings. In general, an application for stay of proceedings cannot be filed by way of application, such as an application for outright rejection of the claim. Regulation 5 to the Arbitration Procedure Regulations states that if the application for stay of proceedings was not included in the statement of defense, it will be formulated according to Form 1 included in the addition.

Under Regulation 241(b) to the Civil Procedure Regulations, an affidavit of the relevant facts must be appended to all applications filed to the court. In general, the court is strict in ensuring that the application be filed along with the affidavit, and rejects applications for stay of proceedings if these are missing the affidavit. However, in extraordinary cases, if there is evidence and the required facts are indicated by the application and the documents appended thereto or other documents presented to the court, there is no need for attaching an affidavit. The applicant's affidavit must be attached, but sometimes it is also possible to attach an affidavit given by another person who is not the applicant, which supports the facts of the application.[32]

The Date for Filing the Application for Stay of Proceedings

The party arguing for stay of proceedings must voice this argument at the first opportunity, whether by filing an application or through its statement of defense. The first opportunity test for stay of proceedings is identical to the test applicable for voicing arguments regarding lack of local jurisdiction before the court, prior to the court's deliberation of the action brought before it. This test is intended to prevent litigants from "choosing an instance" in which to litigate. The test will suit the nature of the proceedings and the stage which they have reached, and will not be based on a technical test related to the nature of the statement submitted or the question of whether or not the statement detailing the plead is the first statement or was preceded by other statements. In those cases where proceedings were held prior to the action, such as an application for

[32] It should be noted that under the Civil Procedure Regulations, the identity of the person submitting the affidavit is relevant for the declarant's appearance for hearings, see Regulation 522(a)-(c).

temporary relief to which the applicant submitted a response, it has been determined that the applicant will not be obligated to plead for stay of proceedings. Section 5 does not mandate that the application for stay of proceedings be filed at the first opportunity, but rather states: "No later than on the day on which the applicant first pleads **to the substance of the action**". We believe, that there is no obligation to consider the application for temporary relief as opportunity for pleading for stay of proceedings due to the existence of the arbitration clause.

The Applicant's Readiness to Submit to Arbitration in the Past and in the Present

According to this section, the court will stay proceedings between the parties to the agreement only if the applicant was prepared to do everything required for the institution and continuation of arbitration, and remains prepared to do so. When notices are sent warning of "breach of contract" and "initiation of legal action", these notices will not be considered as a request to litigate through arbitration. Therefore, a response to these notices, which does not include a proposal for litigating through arbitration, is not considered as unwillingness to submit to arbitration. There is no obligation for the applicant to prove that, when the dispute arose, he asked the claimant to litigate through arbitration. It is sufficient for the claimant to prove that he tried to submit the dispute for arbitration, and the applicant refused or did not agree to the proposal.

The Court's Discretion in Deciding the Application

Courts tend to stay proceedings and validate arbitration agreements,[33] unless there is a special reason not to stay proceedings. "Special reason" is a general title for cases in which the court, in its discretion, will avoid upholding the arbitration agreement. **This is not a finite list of cases**. The burden of proving the existence of "special reason" not to stay proceedings lies with the claimant arguing for such reason.

[33] Civil Leave of Appeal 6233/02 **Extel Ltd. v. Calma V Industry, Aluminum Glass and Ironworks Marketing Ltd.**, Ruling 58(2) 634 (2004). See also Civil Case (Central District) 1746-01-08 **Samsung Techwin Co. Ltd. v. Columbia Equipment an Photography Needs Ltd.**, Nevo (November 25, 2008), where it was ruled that the court will not assist the violation of agreements.

As part of its considerations, the court will examine whether the arbitration clause or the arbitration agreement are valid. Furthermore, the court must see if the dispute falls under the arbitration clause. Arguments regarding the non-existence of an arbitration agreement may constitute a good argument in objecting to stay of proceedings pursuant to an arbitration clause, but such argument must be substantiated.

Bifurcating proceedings when dealing with a large number of defendants some of which are covered by arbitration clauses, does not constitute sufficient cause not to honor the arbitration arrangement. In order to answer the question of whether or not Bifurcating proceedings constitutes "special reason' within the meaning of Section 5(c) to the Arbitration Law, a two-stage test must be applied, which examines **"procedural necessity"** and **"substantive necessity"**, for the continuation of one single process. We believe that the court must seek to concentrate proceedings in one single forum and not bifurcate them.

When dealing with a matter of importance to a large number of people interested in court proceedings, the court will tend not to stay proceedings, For example when dealing with a depriving clause in a standard contract or in a claim filed by apartment buyers against a contractor. Delay in submitting the dispute to arbitration or delay in the arbitration proceedings can be a consideration not to stay proceedings. If the blame lies with the defendant, who protracted matters until the claimant could wait no longer and resorted to legal action, proceedings will not be stayed. A defendant has argued for deceit and requested stay of proceedings. The claimant objected to the stay of proceedings, as he seeks to clear his name in court. Under these circumstances, court rulings dictate that proceedings not be stayed.

In general, the court and the State will not stay arbitration proceedings to which the State is party. After enactment of the Arbitration Law (Amendment No. 2), which granted the right to appeal arbitration awards, we believe that the current Israeli Attorney General will recommend that government institutions resolve dispute outside of court, in contrast to the Israeli Attorney General's directive not to do so.

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Good Faith in Stay of Proceedings

The duty to good faith applies to the parties throughout the arbitration process. Someone who in the past was not willing to submit to arbitration and caused the dispute to be heard in court, cannot apply for stay of proceedings. That person would be prevented from asking for initiating arbitration proceedings, to which he previously objected.

Stay of Proceedings by Force of International Convention

Under Section 6 to the Law, if a claim is filed to the court in a dispute which the parties have agreed to submit to arbitration, and the arbitration is subject to an international convention to which Israel is party, and such convention dictates certain provisions as regards stay of proceedings, the court will exercise its authority under Section 5 according and subject to such provisions. In these circumstances the international agreement includes an arbitration clause in the event of a dispute, and even so one of the parties has filed a claim with the court and has failed to pursue arbitration proceedings. Section 6 to the Law refers to the provisions of the convention regarding stay of proceedings, and even grants these provisions precedence over Section 5 to the Arbitration Law.[34]

One of the conventions which obligate the State of Israel, and which will apply to the majority of international disputes involving Israeli businesses, is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("the Convention"). Article 2(3) to the Convention lists those special cases where the court will not refer the parties to arbitration: when the agreement is null and void, when it is inoperative or incapable of being performed. Except for these cases, the court will not interfere, and is not granted any discretion, in the matter. This list constitutes a finite list of cases.

One of the main purposes of the Convention is to enable efficient enforcement of international arbitration agreements by prescribing uniform standards for enforcing these

[34] According to Judge Gronis in Civil Leave of Appeal 4716/04 **hotels.com v. Zooz Tourism Ltd.**, Pedor 05 (21) 18 (2005).

agreements. Considerations of certainty and concerns for international arbitration agreements not being honored, keeping in mind the preference of the interests of local litigants, have led to the adoption of an interpretive approach which restricts judicial discretion regarding stay of proceedings pursuant to the existence of international arbitration agreements.

Foreign Arbitration Clause

Jurisdiction clauses may prescribe a parallel authority or a unique authority. While a parallel jurisdiction clause grants authority to a certain court, without negating the authority of other courts, a unique jurisdiction clause grants a particular court exclusive authority. However, the court is granted discretion on whether or not to stay the proceedings and refer the parties to the agreed court. Usually, the court honors the jurisdiction clause, considering that this clause constitutes part of the agreement executed between the parties, the court will not assist in its violation.

One of the ways to "identify" a jurisdiction clause is through its wording. If the wording is explicit and unreserved in determining a particular jurisdiction while negating the authority of other courts of law - such clause shall constitute a unique jurisdiction clause. When the wording is inconclusive, uniqueness can be identified through the purpose and tendencies of the clause.

We believe that on the one hand, on the normative level, it is illogical to deny the court's discretion under Section 6 to the Arbitration Law, and there is no material explanation why the law provides differently for foreign jurisdiction clauses - whereby the rule is that the court will stay proceedings unless the claimant indicate special reasons for denying such stay[35] - and a foreign arbitration clause, in which the court has no discretion. On the other hand, the legislator has stated his position in Section 6.

A Foreign Party Seeking to Litigate in Israel

[35] Civil Appeal 362/83 **Menorah Insurance Company v. the Ship "Dunar"**, Ruling 38(2) 505, 518 (1984).

The interest in upholding the Convention literally weakens when it is the foreign party that seeks to litigate in Israel. This, as the Convention aims at protecting the interests of foreign parties and ensuring that international agreements be honored.

Appealing the Decision to Stay Proceedings

If the court has decided to stay proceedings, or has refused to stay proceedings, an appeal with leave must be submitted to the court within 30 days. In cases where the court has decided to stay proceedings, it is possible to apply for issue of a temporary injunction that will bar the arbitrator from hearing the dispute until the end of proceedings in the appellate instance. In cases where the court has decided not to stay proceedings, an application for leave to appeal must be submitted **immediately** without waiting until a ruling is given in the claim. A person seeking to stay proceedings may not wait for the ruling to be given in the claim and only then appeal the court's interim decisions.

Leave to appeal the court's decision regarding matters of arbitration is reserved only for extraordinary cases, where there is a special question of legal or public nature which exceeds the interests of the disputed parties. The appellate instance will also intervene in cases where such intervention is required due to considerations of justice and preventing the distortion of justice.[36]

Chapter 10 - Arbitrator Awards

In this chapter we will discuss Amendment No. 2 to the Arbitration Law as it applies to the approval or cancellation of an arbitration award, in light of the possibility to appeal the award granted by the amendment.

Before starting our discussion, it should be noted that prior to the amendment to the Law, arbitrator awards could be set aside only upon meeting two cumulative conditions: 1. upon fulfillment of one of the ten grounds for cancellation prescribed under Section 24 to

[36] Civil Leave for Appeal 2397/07 **Fortinet, Inc. v. Avnet Communications Ltd.**, Nevo (January 28, 2008); Civil Leave for Appeal 9041/05 **"Imri Haim" Registered Society v. Wiesel**, Nevo (September 6, 2007); Civil Leave for Appeal 1066/06 **Arsadi Ltd. v. Ronen**, Nevo (March 27, 2006).

the Arbitration Law; 2. the existence of the grounds caused a distortion of justice. The court regarded these ten grounds as a finite list which alone will cause the court to intervene with arbitration awards.[37] Errors in the award, such as errors in the application of substantive law, were not included among the grounds for cancellation.[38]

Arbitration Awards will be Given in Writing and Signed by the Arbitrators - Section 20

Under Section 20, arbitration awards will be made in writing and will be signed by the arbitrator, stating the date of his signature. The elements of Section 20 - signature and date - are constitutive elements the absence of which negate the arbitration award.[39] If arbitration was held before a number of arbitrators, a majority signature will suffice, provided that the arbitration award state that the other arbitrators do not wish or are unable to sign the award. If the arbitrator does not fulfill his duty to sign the award, the award shall not be regarded as an arbitrator's award, and will be void. The copy submitted to the court must be signed, as well as the copies given to the parties.

As regards the document's contents, in order for there to be an award, it must end the litigation, i.e. - decide the disagreement between the parties, even if the award cannot end the dispute itself, as the finality of the proceedings are not measured by the litigant's level of satisfaction. The arbitrator, similar to a judge deciding a case litigated in court, makes use of the legal material before him, the findings, the expert opinions brought before him, the minutes and his impressions formed during the hearings. The arbitrator must take into account all of these. In writing his judgment, the arbitrator may enlist the aid of interns working in his office, and there shall be nothing wrong with his doing so.[40]

No Award Hearing in Arbitration

The Arbitration Law does not recognize the arbitrator award hearing (as opposed to the Civil Procedure Regulations). Under the Law, the date on which the award is signed constitutes the date on which it was given.

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[37] Civil Leave for Appeal 1937/03 **Shukrun v. Melin**, Nevo (April 2, 2003).
[38] Civil Leave for Appeal 5991/02 **Gwirzman v. Freid**, Ruling 59(5) 1 (2004).
[39] Originating Motion (Jerusalem District) 6375/07 **Yitzhak Shimon v. Hazait Housing Welfare and Religion Society**, District Takdin 2008(2) 7332 (2008).
[40] Civil Leave for Appeal 4119/95 **Afek v. Cohen**, Pador 95(2) 505 (1995).

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Approval of Unsigned Arbitrator Awards

When the arbitrators' signatures were added a long time after the document was made and without the date of signature being stated, the award cannot be approved. The applicant may object to an application for the award's approval by filing an objection and not by applying for its cancellation.

Relying on an Arbitration Award Which Does Not Meet Format Requirements

The argument that the arbitrator's award is invalid as it does not meet format requirements, is tainted with bad faith. This, under the circumstances where the award has already been given to the parties, and applications have been submitted to the arbitrator for its amendment.

The Power of an Arbitration Award - Section 21

The arbitrator award binds the litigants and their substitutes as an act of court, unless the arbitration agreement imply otherwise. The arbitration award binds the litigants even if the arbitration award was not submitted for court approval.

Act of Court

An act of court is protected under the principle of the *res judicata*, whereby the need to end litigation proceedings is a principle worthy of protection. In order to reject an action outright due to an act of court based on arbitration proceedings, the court will examine which grounds for action were submitted to the arbitrator and exhausted through arbitration, and whether or not the parties agreed that the arbitrator's award will constitute an act of court. This examination, which is factual by nature, mandates caution which exceeds that required for any outright rejection pursuant to an act of court.[41]

Estoppel by grounds of action and issue estoppel - When the action has been heard and decided by the arbitrator - there is no need for another action between the same parties or

[41] Civil Appeal 5634/05 **Tzukit HaCarmel Projects Ltd. v. Micha Tzach General Contracting Company Ltd.**, Pador 07(17) 117 (2007).

their substitutes, when the claim is based on identical grounds. In contrast to estoppel by grounds of action, which prevents further litigation between the litigants on the same grounds for the action, the issue estoppel prevents further litigation between the litigants in a dispute which has already been litigated and decided by a competent court by way of final ruling**.**

Stipulation on the rule regarding an act of court - As aforesaid, the parties may stipulate on Section 21. If the parties have not expressly decided that an act of court will not apply, but have determined that neither substantive law nor civil procedure law will apply, such agreement will not be relevant, as even if substantive law and procedure do not apply, the laws of arbitration still do, including Section 21.

The Difference Between an Interim Award and Another Decision

An arbitrator's award will be considered a final award when the arbitrator completes his review of all matters pending his attention and the award has a clear, actionable possibility to execute the decision. There is no obstacle to the arbitrator's final award being comprised of several documents which have been consolidated on various dates, provided that these documents clearly indicate that each of them constitutes an independent unit regarding to a particular issue. This will be of relevance as to the date for submitting the application for annulment.

When arbitrators make interim awards, it is not only within their power to complete their job and make a final award, but it is their duty to do so.

When is it possible to contest an interim award? It is possible that failure to immediately contest an interim award - even before the arbitration proceedings have ended - may lead to that right being lost. There is no clear-cut precedent in this matter. The recommendation is to avoid bifurcated proceedings. Bifurcating proceedings into stages, is a bad idea as far as arbitration is concerned, as the losing party in the first stage will do anything in its power to frustrate the rest of the arbitration proceedings.

The Arbitrator has Continued Hearing the Dispute After Making the Award

We believe that if the litigants are in contact, including with the arbitrator, after the arbitrator's award has been made, it is necessary to examine whether there was an alleged

resolution to a new agreement by the arbitrator which could "heal" the decisions given after the award has been made. If the answer to this be negative, then the arbitrator's authority had already expired when the arbitrator gave his decision after making his award. Therefore, there is need for evidence as to the parties' agreement to "resume" arbitration.

Setting Aside an Arbitrator's Award and Appeal Thereof - Changes in Legislation

Pursuant to Amendment No. 2 to the Law, the change instituted in Section 21A(a) added to the Arbitration Law, is that if the parties to an arbitration agreement have decided that the arbitral award can be appealed before an arbitrator, the arbitrator will explain his appealable arbitral award. Furthermore, Section 21A(b) states that the provisions of the amendment apply to the arbitrator, proceedings before an arbitrator and the arbitral award, and will apply *mutatis mutandis* on the appellate arbitrator and on the appeals process.

The new Section 21A(c) to the law dictates that if the parties have agreed to pursue arbitration with an appellate instance, an application for cancellation of the arbitral award may only be submitted based on the grounds provided in Sections 24(9) and (1), i.e. - if there are grounds which are contrary to public policy or if there are grounds whereby a court would cancel a final award which cannot be appealed.

Section 24(9) - the contents of the award are contrary to public policy - The term "public policy", which appears in Section 24(9), is derived from contracts law. In the majority of cases where it is possible to annul a contract pursuant to a defect in the intent of one of the parties, this is due to behavior on the part of the other party (deception, duress or extortion). Occasionally, this behavior constitutes a civil wrong or a wrong pertaining to bad faith in negotiations. Sometimes, this behavior may actually constitute a criminal offense.

Section 24(10) - there are grounds whereby a court would annul a final award which cannot be appealed - This ground does not constitute a "basket clause", as court rulings

have determined clear tests for the section's implementation, such as receiving false evidence and injury to trust by the arbitrator.

An arbitrator's conflict of interests may lead to annulment of the arbitral award based on the grounds set forth in Section 24(10). The party applying for an arbitrator's disqualification on these grounds must prove that there was a flaw in the conduct of the trial or the arbitration proceedings, or in the arbitrator's decisions. It is sufficient to prove a conflict of interests which could have occurred due to the arbitrator's circumstances or status, and the possible effect that this conflict of interests may have had on the results of the proceedings.

Blatant lack of objectivity by the arbitrator throughout the arbitration proceedings, in favor of one of the parties, will constitute just grounds for that arbitrator's removal. The litigants' personal familiarity, or even friendship, with the arbitrator will not serve to prevent the arbitrator's appointment, provided that each litigant is aware of the extent of the arbitrator's friendship with either litigant. Therefore, if the litigants agree to appoint a friend as arbitrator, and the arbitrator accepts such appointment - the appointment will be valid. The arbitrator is qualified to rule in the dispute, and his award will be approved by the court.

In the event of deceit, it is necessary to determine who was injured by the deceit. If the deceit was aimed at the arbitrator, then the award was given in error and must be annulled, similar to annulment of a court ruling. If the deception was aimed at the other litigant, it is necessary to determine the circumstances to see if he may be prevented from making this argument. If the deception pertained to the external conduct of legal examination, then that constitutes unfair obtaining of award.

The Dates for Filing the Application to Annul the Award Pursuant to Sections 24(9) and 24(10)

The dates are a fundamental component in filing an application for annulment, and the entire process is based on the litigants' meeting these dates. The rule prescribed in Section

27(a) to the Law is that the application for annulment of an arbitral award be filed within 45 days of the arbitral award being made, or within 15 days of the date on which the respondent (in the application to approve the arbitral award) received notice regarding the application for approval, and all within the 45 day period. In an application to annul the award pursuant to Section 24(10), even if the arbitral award was approved, an application may still be filed for its annulment if the facts serving as grounds for the application be discovered after the award's approval.

The Dates for Filing an Appeal

Under Section B to the Second Schedule, the appeal will be submitted to the arbitrator within 30 days of the date on which the arbitral award was made to the litigants or from the date on which the appellate arbitrator was appointed, the later of the two. The other litigants may submit a detailed reply to the appeal within 30 days of the date on which they received the appeal. The appellant may submit his response to the reply within 15 days of the receiving the latter. The schedule provisions are set forth in the Second Schedule, and so it is possible to stipulate on them when formulating the agreement. We believe that the arbitrator's discretion to extend the period for filing an appeal - is not limited only to special reasons.

The appellate arbitrator must make his award within two months from the end of the appellate proceedings. The appellate arbitrator is not granted authority to extend this date unless the parties have so agreed in writing.

Amending the Arbitral Award

Section 22 to the arbitration law dictates that the arbitrator and the court may amend errors that occurred in the award or supplement the award if it be lacking, at the request of a litigant and provided that the litigants have been given ample opportunity to present their arguments.

Amendment by the arbitrator - The arbitrator may amend his award if it contains clerical errors, *lapsus calami*, an omission, an error in the description of a person or

property or in any date, number, calculation, or the like. The arbitrator may also amend his award if the award is flawed in a matter which does not pertain to the dispute itself. This will also be the case if the award does not provide for payment of interest, and if the arbitral award does not provide for the parties' expenses or attorney's fees.

The arbitrator's authority to amend his award is broader in scope than the court's authority to amend an award. We believe that expanding amendment powers in arbitration proceedings as compared to court proceedings expresses a tendency to reinforce the arbitration system and the arbitral award, so as to avoid further litigation.
An application to amend the arbitrator's award due to those grounds set forth in Sections 22(a)(3) and 22(a)(4) will only be heard if submitted to the arbitrator within 30 days of the arbitral award being made or served to the litigants. After this 30 day period, the arbitrator may not grant the application for amendment and only the court will be authorized to approve such action. The application to amend the other errors, such as errors of omission, flaws not related to the disputed matter itself, can be filed without limitation as provided by the Law.

Amendment by a court of law - Pursuant to Section 22(d) to the Law, the court is authorized to amend an arbitrator's award if it contains clerical error, *lapsus* calami, omission, an error in the description of any person or property or in any date, number, calculation, or the like., or if the award is flawed in a matter which does not pertain to the disputed matter itself. The court must amend the award in a hearing on the award's approval or annulment, even if the parties did not so apply to the arbitrator or applied but the arbitrator has not given his decision.

The legislator settled possible conflicts which may arise from an application being filed with the court for annulment of an award, and an application being filed with an arbitrator for amending the award according to Section 22 to the Law. The concern is for the expiration of the period allotted for filing an application for annulment if an application for amendment is filed with the arbitrator. Under Section 27(b), in the event that an application is filed with the arbitrator pursuant to Section 22, the count of the days will

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begin from the date on which the arbitrator gives his decision or was obligated to give his decision regarding the application. In the event of proceedings pertaining to an application to approve or annul the award, according to Section 22(d) to the Law, it will be possible to argue for the amendment, and the dates will be determined according to the dates of submitting the application for the award's approval or annulment.

Approving the Arbitral Award - Section 23 to the Law

The date for filing the application for approving the award - The Arbitration Law does not prescribe a date for filing the application for approving the arbitrator's award. This, as the award is valid even without court approval and is approved once the following dates have passed: the date for filing an application to annul the award pursuant to Section 24; the date for appealing the arbitral award before an arbitrator pursuant to Section 21A; the date for filing an application for leave to appeal the arbitral award before the court pursuant to Section 29B. However, it is necessary to approve the award when one of the parties is interested that the award be enforceable through judicial execution.

Is it possible to apply for the award's approval even after a prolonged period in which no action has been taken for its approval and no action has been taken for its execution? We believe that arbitration awards should not be approved lightly, and their approval should not be taken for granted if the application for approval was submitted after much time has passed from the date of the award being made. The court will regard belated application as delay, and the applicant will be required to demonstrate good grounds for approving the award after such a long time.

Approving the arbitral award as part of an application for its annulment - Another way of approving the arbitrator award is if an application has been filed with the court to annul the arbitrator's award - and this application was denied. In this case, the court is authorized to approve the arbitral award, even if no application was submitted for its approval. If the court has rejected the application for annulment in part, or has supplemented or amended the arbitral award following the application, the court will approve the award if it has not been annulled or as supplemented or amended.

Approving the arbitral award as part of an application for leave to appeal the

award - Following the change in the Law and the addition of the section dealing with the option to apply for leave to appeal an arbitrator award before a court under Section 29B to the Law, it was necessary to add in Section 28 to the main law, after the word "dismissed" the words "or dismissal of the appeal filed pursuant to Section 29B", and instead of the word "in part" to replace "or the appeal in part" and erase the words "the application". Meaning, the court which dismissed the application for leave to appeal the arbitrator award, may approve the arbitrator award. If the court reject the appeal in part, or has supplemented or amended the arbitral award following the application, the court will approve the award as supplemented and amended.

The application for approving the award - Pursuant to Section 8 to the Arbitration Process Regulations, 5729-1968, a litigant wishing to approve the award in court will apply to do so by way of notice, as per the format prescribed in Form 3 in the addendum, attached with a copy of the arbitral award, signed by the arbitrator, and with additional copies according to the number of respondents, with each respondent receiving a copy.

Annulment of the Arbitral Award

An application to annul the arbitrator's award will be filed according to Section 9 of the Regulations, by way of originating motion. The application will detail the grounds on which the application is based, according to those grounds listed in Section 24, and will be accompanied by an affidavit verifying the facts stated therein. Regulation 241 to the Civil Procedure Regulations obligates the litigants to append the legal references to the application for annulment. The regulation grants the respondent the right to reply to the application within 20 days of receiving it, unless the court prescribe a different date. The reply will be appended with an affidavit verifying the facts argued by the respondent, and the applicant may respond to the reply within 10 days unless the court prescribe a different date for such response. Under these regulations, the court may decide the application without summoning the litigants. Therefore, the application and the affidavit must detailed and clear. Let us now discuss each of the grounds for annulment separately.

No valid arbitration agreement - Section 24(1) - The arbitration agreement is the cornerstone of the arbitration process. It can sometimes happen that the arbitration

process was held without an arbitration agreement, or that the arbitrator is not competent to hear the matter of the dispute, for example in cases of employee rights, in cases of error in the parties' identification, unlawful agreement, contract for the sake of appearances, a contract which one of the parties was not competent to sign or was contingent in its competence. If the arbitrator has initiated arbitration proceedings and no valid arbitration agreement governed the parties, there is grounds for annulment of the arbitral award pursuant to Section 24(1).

The arbitration clause becomes active when a dispute arises between the parties. Until then, the clause is "dormant". Only when the contract terminates through its violation does this clause awaken. It is possible to decide a dispute by arbitration even when the disputed matter is the annulment of the agreement. However, if the contract was signed but is founded on an act of deceit, it is fundamentally void, and so the arbitration clause is likewise rendered void. When the court to which a claim for annulment of an award has granted the claim, the decision is likened to annulment of the arbitration clause. If an application for annulment was made and the court granted such application - it is not possible to approach a different arbitrator, and the arbitration agreement expires.

Section 19 to the Contracts Law (General Part), 5733-1973, dictate that if the contract can be divided into parts and the grounds for annulment pertains only to one of its parts, it is possible to annul that part only. This means, that it is possible to validate the agreement along with the arbitration clause despite a part of the agreement being rendered invalid. In striking out those sections which render the agreement void, it is necessary to consider the provisions of Section 3 to the Arbitration Law, which states that an arbitration agreement will not be valid if the dispute cannot be submitted for arbitration. However, if we must assume that a party would not have entered into the contract but for the grounds, that party may annul this part or the entire contract. According to Section 30, a contract whose execution, content or aim are unlawful, immoral or contradict public policy - is void.

Arguments as to pressure, duress, constraint and any other behavior which serves to negate the free will of a party must be voiced immediately upon their discovery by way of an application for declarative ruling regarding the annulment of the agreement or in the

first arbitration session. Waiting until the ruling is given will cause this argument to be rejected due to prevention.

For issues pertaining to the validity of the arbitration agreement, it is necessary to examine the fulfillment of two cumulative conditions: **first**, the arbitration agreement, as a contract, must be valid in that it is not disqualified pursuant to Section 30 to the Contracts law; **second**, the arbitration agreement must be valid in that the matter submitted to arbitration may serve as a matter for agreement between the parties.

Award made by an arbitrator not duly appointed - Section 24(2) - This cause occurs in situations where the arbitrator has decided the dispute despite the conditions for his appointment not being met. The conditions required for the arbitrator's appointment are the parties' agreement to resolve their disputes through arbitration. If the arbitration agreement is not valid, then the arbitrator's appointment will likewise be invalid, or when it has been decided that the arbitrator meet certain criteria, and he has not; or when an institution or third party has been appointed to select the arbitrator, such as the Head of the Israel Bar, but the arbitrator was appointed by another person. Parties applying consensually to a recognized authority - such as the Head of the Israel Bar - for appointment of an arbitrator may expect the authority to which they applied will appoint the candidate which it deems most fit, and will reach its decision after conducting all examinations which it can reasonably undertake.

When applying for annulment of an arbitral award on the grounds of Section 24(2), it is possible to argue for estoppel, as arguments under this section, similar to arguments pursuant to Sections 24(3) and 24(4), can be made only when the party making such argument has done everything in its power to avoid the arbitration proceedings and has given the arbitrator official, explicit and unequivocal warning that it does not agree to his appointment.

Lacking a clause providing for the appointment of a substitute arbitrator, once the original arbitrator has resigned, the parties much reach a clear and unreserved agreement regarding the identity of the substitute arbitrator.

An arbitrator who has been subject to disciplinary action and the disciplinary tribunal did not order his temporary suspension will be fully competent to continue his activities as an attorney. Furthermore, his competence to serve as an arbitrator is likewise not affected. Such an attorney is not obligated to notify clients seeking his services of the accusations made against him.

The arbitrator has exceeded his authority - Section 24(3) - The parties to the arbitration agreement shall determine the arbitrator's authority, which matters will be submitted to his decision, when he will decide to hold sessions, and which procedures of law he will follow. If an arbitrator who exceeds the parties' instructions, explicitly or implicitly, his award will be annulled pursuant to Section 24(3) to the Law. One of the risks entailed for parties pursuing arbitration is the broadness of the arbitrator's powers, which is oftentimes expanded by the parties, whether explicitly or implicitly. In another case it was ruled that the arbitrator did not exceed his authority when the parties decided to expand the scope of their dispute and present various arguments in their summations pertaining to their internal relationship.

There is disagreement on the matter of whether, under the grounds for annulment of arbitral awards set forth in Section 24(3) to the Arbitration Law and dealing with exceeding authority, it is also possible to include the award of relief which exceeds that demanded in the statement of claim.[42] In one case where it was argued that the arbitrator ruled in excess of the amount demanded as relief, the court ruled that the provisions of Section 24(3) should not be applied in these circumstances. When the arbitration agreement is unclear regarding the scope of the dispute submitted for arbitration, the agreement must be interpreted expansively.

Injury to the rules of natural justice has also been stated in several court awards as a possibility that the arbitrator exceeded his authority. However, this matter has yet to be decided conclusively.

One of the litigants was not granted ample opportunity to present its arguments or present its evidence - Section 24(4) - Upon reviewing the grounds for annulment

[42] Civil Appeal 5248/94 **State of Israel v. Kibbutz Ein Gev**, Ruling 50(1) 284 (1996).

detailed in Section 24 to the Law, we find that the test is examination of the propriety of the arbitration process as per the parties' agreement, and these grounds do not indicate the examination of the content of the award. However, this does not mean that the court hearing the application for annulment of the arbitrator's award, and which finds that the arbitrator exceeded his authority and that a material flaw pertaining to the root of the matter occurred in the arbitration proceedings due to a litigant not being granted opportunity to present its evidence and voice its arguments, must accept these procedural flaws and approve the award.

However, the duty to allow the parties to present their arguments is not absolute. The applicant for annulment of the award on these grounds must prove that the failure to grant opportunity was not caused by any conduct on his part. Although the arbitrator is obligated to the rules of natural justice, but if one of the parties knowingly ignores the option to state its arguments and focuses on assaulting the arbitration process itself, that party's arguments under Section 24(4) will not be heard.

Without the right to review documents and evidence, the right to argument will not be complete. The litigants are entitled to review the expert opinion and the documents on which the expert opinion relies. If the arbitrator has denied the right to cross-examine and the right to submit a counter expert opinion, that arbitrator's award will be annulled, as denying the option to cross-examine detracts from the right to argument and proof of evidence.[43]

According to Section 15 to the Law, the arbitrator is authorized to make his award in the absence of a party. In these cases, the arbitrator must exercise discretion prior to deciding the dispute without the absent party being able to state its arguments. When the arbitrator is about to hold a hearing and rule the dispute in the absence of a party, he must give warning to that litigant. This warning must refer to a specific session and a general warning will not suffice. The arbitrator may annul the award and renew the hearings if he is convinced that the litigant was absent or did not state his arguments for good cause.

Is it mandatory to first follow the provisions of Section 15(b) to the Arbitration Law and request that the arbitrator annul the award and renew the arbitration proceedings, or is it

[43] Civil Case (Haifa District) 279/03 **Buzaglo v. El Omrim Rural Construction Company Ltd.**, District Takdin 2004(4) 27 17 (2004).

possible to apply directly to court for the annulment of the award under Section 24(4)? And if it is not mandatory - which way is preferable? Common practice is that the provisions of Section 15 are special provisions for cases where the award was given in the absence of a party. As such, these special provisions have precedence over the general provisions. Therefore, according to this approach, a litigant in whose absence the arbitration award was made cannot apply for annulment under Section 24(4).

Clarification questions posed by the arbitrator do not detract from opportunity to state arguments and present evidence.

The arbitrator did not decide one of the matters submitted for his decision - Section 24(5) - Similar to court procedure, the arbitrator is not obligated to rule regarding all arguments, be they major or minor, principle or alternative, made by a litigant. Furthermore, the arbitrator may state his opinion in those matters which he believes require decision, without referring to other matters. It is clear that if the arbitrator did not decide matters submitted for his decision, he has not completed his task, and indeed, in most cases the court will return the award to the arbitrator for supplementation.[44]

The arbitration agreement stipulates that the arbitrator must explain his award and the arbitrator has failed to do so - Section 24(6) - Prior to the change enacted in the Law through Amendment No. 2, provision N to the First Schedule[45]exempted the arbitrator from being bound by substantive law, evidence law and the procedures of law common in court. According to this provision, the arbitrator was exempt from explaining his award. Now, under the material change instituted by the amendment to the Law, the default condition under the addendum to the law[46] is that the arbitrator must explain his award so long as the parties have not stipulated otherwise. This change reinforces the arbitration process and in the future will prevent excessive application to the court for annulment of arbitral awards.

Explaining the arbitral award offers tremendous benefits. Litigants who require that the arbitrator explain his award, show greater interest in examining his award, even if they are

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[44] Civil Case (Haifa District) 811/04 **Yaacov v. Peleg & Sons Construction and Development Company Ltd.**, Pador 06(27) 252 (2006).

[45] Prior to the amendment, the First Schedule was known as "Schedule".

[46] This refers to the First Schedule to the Law; all references in this chapter which do not state otherwise refer to the First Schedule.

unable to annul it due to errors. It is the right of every litigant, and especially one who has lost the litigation, to ask the person deciding his dispute on what grounds he has decided against him. The arbitrator must offer good explanations for his decision, so that the losing party may understand that it has justly lost. Case precedent dictates that it is sufficient for the award to be explained so that one can understand that the arbitrator did not overlook the matters submitted for his decision, that he did not overlook the parties' arguments, that professional attention was given to all these and reasons, presented in condensed form at the least, which have led the arbitrator to his award.

The addition of Section O1) to the addendum regarding the arbitrator's obligation to explain his award, may lead to a situation in which if the arbitrator's decision lacks explanation, the court will not demand that the arbitrator amend his decision, but will rather annul the arbitral award. We believe that the purpose of the amendment to the law and the legislator's intention to streamline the arbitration process and prevent the burden borne by the courts, requires the duty to explain the award be substantive.[47]

The arbitration agreement stipulates that the arbitrator must decide according to law and the arbitrator has failed to do so - Section 24(7) - If the arbitration agreement states that the arbitrator will rule according to substantive law in Israel, the arbitrator must honor the parties' agreements. If the arbitrator award in violation of those agreements, his award will be annulled. Even if the arbitrator has erred in interpreting the law, precedent dictates that the arbitrator's errors in interpretation and application of the law, prescribed by the arbitration agreement, will not constitute grounds for annulment pursuant to Section 24(7) to the Law. The court will not substitute the arbitrator's judgment with its own. If the arbitrator was obligated to rule according to law - he must do so. If the arbitrator intentionally ignored the law, his award will be annulled.

The award was made after the period for doing so - Section 24(8) - This cause for annulment must be read together with Section 26(c) to the Law which states: "The plea of a party that the award was made out of time shall not be heard, unless he reserved - by written notice to the arbitrator before the award was made - the right to make that plea". In order for the litigant to reserve his right to argue the grounds in Section 24(8), he must

[47] See also the addition of the obligation to give grounds in the Arbitration Law (Amendment No. 2), 5769-2008, Sections 21A(a)(1) and Section 29B(b).

reserve the right to make such argument by way of written notice given to the arbitrator prior to the award being made.

The parties' inactivity cannot in itself be interpreted as waiver of the arbitral award.[48] The Haifa District Court has annulled an arbitral award given in delay. It was ruled that despite the parties' arbitration agreement stipulating that the arbitral award be given within seven days of signing the agreement, the award was made only many months later. Neither party argued that any act to extend the deadline for making the award was made by the parties or by the arbitrator, as dictated by Section O to the addendum to the Arbitration Law. Under these circumstances, it seems that the grounds for annulment under Section 24(8) to the Arbitration Law are met.

The contents of the award are contrary to public policy - Section 24(9) - The term "public policy" stated in Section 24(9) was adopted from Section 30 to the Contracts Law (General Part). The power to annul the award on these grounds will be mainly be exercised when the contents of the arbitration award can "damage the interests, principles and values that our society seeks to uphold".[49] What are these values and when will an arbitral award be contrary to public policy? Below are cases where the court has determined that the award contradicts public policy. We will try to conclude what each of these awards has been defined as such:

a. Part of an arbitrator's award prescribing attorney's fees of 17% of the rewards which the applicant will receive from the National Insurance Institute of Israel, was annulled. This is an anomalous situation which is contrary to public policy, as the attorney's fee agreement prescribing fees of 17% for handling proceedings with the National Insurance Institute - while the Road Accident Victims Compensation Law, 5735-1975, dictates a maximum fee of 8% for such claim prior to its submittal to the court - is clearly contrary to public policy and the awards limiting the fees received from proceeds to 8%.

The Institute for Consumer Information Ltd.

[48] Civil Leave for Appeal 6171/99 **T.S. Silicate Industries Ltd. v. Rotem Ampart Negev Ltd.**, Ruling 55(1) 327 (1999).

[49] Additional Civil Hearing 9563/03 **Kadoori and others v. Naim Khalif (Golan)**, Pador 04(3) 848 (2004).

b. An arbitral award which ignores the ruling of the district court, which creates an act of court, and which erects procedural obstacles preventing one litigant from suing the other litigant, is contrary to public policy.

c. An arbitral award which awards a litigant rewards for connections in "high places" (bribery) and which explicitly refers to payments for the cancellation of investigations, is unequivocally contrary to public policy. The court has adopted an international stance and stated that such an arbitral award contradicts international mandatory rules which serve to constitute international public policy.

There are grounds on which the court would annul a final award which cannot be appealed - Section 24(10) - The cause for annulment under Section 24(10) is intended for those cases of injury to principles of natural justice, or where new facts are uncovered which were unknown to the applicant during arbitration and which were unknown at the time not through any fault of the applicant, or if deceit is found which affected the arbitral award or when there was no authority to pursue arbitration.

The arbitrator's conflict of interests may lead to annulment of the arbitral award on the grounds set forth under Section 24(10). It is sufficient to prove conflict of interests which may have occurred due to the arbitrator's situation or status and to prove that this may have had possible effects on the award.

In examining the arbitrator's objectivity, the court must consider two aspects of the matter. **The first**, a subjective aspect, is whether one or both of the parties to the arbitration proceedings have lost their faith in the arbitrator. **The second**, an objective aspect - under the circumstances, would a reasonable person form the impression that there is real concern that the arbitrator not be able to decide the dispute brought before him in a fair and equal manner. The litigants' personal familiarity, or even friendship, with the arbitrator does not prevent that person's appointment as arbitrator, provided that each litigant is aware of the extent of the arbitrator's friendship with the parties.

It would seem that a party to the arbitration proceedings which considers itself injured by the arbitrator's conduct may apply to the court pursuant to Section 11 to the Arbitration Law for the arbitrator's removal. Except that this process originates from a stage in which the arbitrator has yet to make his award. Blatant lack of objectivity by the arbitrator throughout the arbitration proceedings in favor of one party, constitutes just grounds for the arbitrator's removal and for annulment of his award. In the event of deceit, it is necessary to determine who was injured by the deceit. If the deceit was aimed at the arbitrator - then the award was given in error and must be annulled as would a court ruling.

Distortion of Justice - Section 26(a) to the Law

Grounds for annulment pursuant to Section 24 will not in itself justify the annulment of the arbitral award. The applicant must still overcome the "filtering" obstacle posed by Section 26(a) to the Law, and convince the court that it is indeed necessary to annul the arbitral award due to miscarriage of justice. The less severe the grounds for annulment, the more meticulous the court can be in examining whether or not miscarriage of justice occurred. The more severe the grounds, the more the miscarriage of justice becomes clear. In any case we are dealing with consequential miscarriage of justice.

Partial Annulment of Arbitral Awards - Section 26(b)

It is not always justified to annul the entire award, if flaws occurred only in certain parts and not in the entire award. The parties are entitled that the decision given in their case, which was not flawed, remain valid.

The Dates for Applying for Annulment

The dates - The rule prescribed by Section 27(a) to the Law is that the application for annulment of an arbitral award be filed within 45 days of the award being made. The court may extend the deadline for applying for annulment due to special reasons which will be detailed. In special cases, the court will extend the deadline of its own volition even if it was not requested to do so, and in any case where an application for approval was submitted for foreign arbitration awards. Pursuant to Section 10 of the Arbitration

Procedure Regulations, if an application for approval of an arbitral award was submitted within the 45 day period, the application for annulment must be submitted within 15 days of the application for approval being filed, provided that 45 days not pass from the date on which the arbitral award was made.

If in an application for annulment under Section 24(10) to the Law, the grounds for a court annulling a ruling which cannot be appealed were met, the 45 day period will begin from the date on which the facts serving as the basis for the application were discovered, and Section 27(c) will not apply. This means that it will be possible to file an application for annulment on these grounds even if the award has already been approved by the court. The 45 day limit does not apply for applications for annulment on the grounds set forth in Section 24(1), whereby there was no valid arbitration agreement.

Court recess - The often-discussed question in court rulings is whether to count recess days. Are they not to be included? Will Regulation 529 to the Civil Procedure Regulations also apply in this matter? The importance of deliberating these questions pertains to the basic principles of our system of justice - certainty and finality of proceedings. Regulation 529 to the Civil Procedure Regulations states that the court recess period will not be included when counting the days prescribed "in these regulations", i.e. - the Procedure Regulations. Regulation 2 to the Arbitration Regulations states: "The Civil Procedure Regulations will apply to court procedure regarding arbitration, unless these regulations provide otherwise." One approach advocates that the Arbitration Regulations and the Arbitration Law indicate that no special provisions were prescribed regarding recesses in arbitration proceedings. Therefore, we must look to the general provision prescribed under Section 529 to the Civil Procedure Regulations. On the other hand, we find an approach advocating a normative hierarchy and that regulations will never supersede main legislation. The decisive legislation is that stated in Section 27 to the law. The provisions of the law were intended to serve the purpose of the arbitration system to decide disputes quickly and efficiently. Ultimately, it has been ruled that the deadline prescribed under Regulation 10 is limited to the 45 days under Section 27 to the Law. Authority to extend this period is granted when exceeding the 45 day

limit. However, there is no provision for cases exceeding the deadline prescribed under Regulation 10 within the 45 day limit due to the recess period not being taken into consideration.

Extension of deadlines - Among the many opinions ruled by the Supreme Court that extending deadlines in arbitration proceedings will be limited due to the desire to fulfill the purpose of the arbitration process - fast decision - the opinion has also been heard in the district court that the procedures of law are a broad and flexible framework and we must not forget that this framework is only a means of achieving the worthy end of providing justice. The considerations for extending deadlines will be cumulative and will be inferred from all the applicable circumstances. The court will consider the delay in filing the application, the circumstances argued in the affidavits, and the chances for the application for annulment to be accepted.

The court is authorized to extend the deadlines of its own volition in special cases, such as blatant deceit.

The first cause - Section 27(d) refers to cases where the application is made pursuant to the cause set forth in Section 24(1) - "The arbitration agreement was not valid". The argument whereby no valid arbitration agreement existed, is not limited in time, as something that is invalid is not rendered valid by the passage of time. If an application was filed for extending the deadline for applying for annulment of the award, delay in the filing of such application will not serve to prevent inclusion of the argument that there was no valid arbitration agreement in the application for annulment of the award. However, there is no room to argue that the argument for annulment pursuant to Section 24(1) constitutes special grounds for extending the deadline for stating the other grounds for annulment.

The tenth cause - When the application is based on the tenth cause, it must be verified by affidavit and it is necessary to detail the circumstances justifying the annulment of the award. Furthermore, the affidavit must detail the date on which the applicant became aware of the facts justifying use of this cause. We believe that this provision is logical. The applicant for annulment should only be restricted from the time in which all the facts, which may be used as grounds in his application, are in his possession.

Attachment Order

After the arbitral award is made and approved by the court, the litigant who was awarded the award may act for its execution. Under Section 29 to the Law, the application for annulling attachment can be submitted verbally upon the court ruling approving the arbitral award being handed down, and it is even possible to grant the applicant exemption from providing collateral. In attachment, the rule is that proceedings are not instituted without prior warning, except in special cases which justify such action.

General Temporary Relief After Making of Award

The arbitral award binds the litigants and their substitutes as an act of court, subject to the proceedings for annulling the award, and if the arbitration agreement does not imply otherwise. Section 29(a) to the Arbitration Law grants the court the authority to determine temporary relief for the period of time between the application for approving the arbitral award being submitted, and the date of the court's decision of the application. This section indicates that the purpose of the relief listed in Section 29(a) in general, and the deposit of collateral in particular, is to guarantee the execution of the arbitrator's award, upon its approval.

When granting temporary relief, whose purpose is to maintain existing conditions during the proceedings for annulment of the arbitral award, the court will, first and foremost, consider the chances for the annulment process's success, and it is sufficient for the application for annulment not to appear baseless and without chances for success. Another consideration is the balance of convenience between the parties upon granting or denying the temporary relief. In this matter, there is substantial difference between a financial award and an award enforcing a real estate transaction. In the first case, there is not too much difficulty in achieving restitution, while in real estate transactions, if the transaction will be completed despite the application for annulment being filed, restitution may prove impossible. These considerations will be added to those pertaining to the special nature of the judicial process of reviewing an arbitral award and is purposes. As regards the arbitral proceedings, the court may emphasize the fact that the

award has yet to be approved and the proceedings have yet to be enforced through judicial execution.

Guarantee - Upon an arbitral award being made and obligating one party to pay moneys (the second party) to the party in whose favor the award was made (the first party), the second party wishes to file an application for annulling the arbitrator's award. Consequently, the first party requests that the court order guarantees to be provided for fulfillment of the arbitral award.

Enforcement of Foreign Arbitral Awards

In the event that arbitration was held outside of Israel and the arbitral award has been made, that arbitral award which was made - let us assume, in English - constitutes an act of court between the parties but cannot be immediately enforced. If it is to be enforced in Israel, it is necessary to apply to the court in Israel so that it be possible to execute the award in Israel.

Enforcement through an ordinary claim filed pursuant to Section 29 - The awarded party may apply to a court in Israel in an ordinary claim on the grounds of the award. The court in Israel will hear the claim, summon witnesses and consider whether the obligation still exists. The court will issue a ruling which will be enforceable through the judicial execution authorities.

Enforcement by force of the New York Convention - The arbitral award can be enforced in Israel by force of the New York Convention. Article 3 to the New York Convention dictates that each contracting country recognize arbitral awards to be binding and will enforce them according to the procedures of law common in the country relying on the award. Article 5 to the Convention prescribes grounds on which the court may refuse to enforce the arbitral awards. Article 5(1) lists these grounds: the arbitration agreement being void, impropriety in the arbitration proceedings, the arbitrator exceeding the scope of his authority or lack of authority, irregularities in the composition of the arbitral authority or the arbitral procedure, the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which the

award was made. The grounds prescribed in Article 5(2) which the court may invoke of its own accord, and when fulfilled - to refuse the enforcement of the arbitral award, are: (1) the dispute cannot be settled by arbitration under the law of the country in which it is to be enforced; (2) enforcement of the arbitral award would be contrary to the public policy of the country in which it is to be enforced.

Regulations for the Execution of the New York Convention (Foreign Arbitration), 5738-1978 - These regulations were intended for implementing the Convention, and so state: "and will be interpreted together with the Convention" (Regulation 2). Furthermore, auxiliary legislation ahs applied the Arbitration Procedure Regulations, 5728-1969, to the extent that they not include any provision which is contrary to the Regulations for Implementing the Convention and *mutatis mutandis*.

Arbitrator's Authority to Decide on the Validity of Foreign Arbitral Awards

The Arbitration Law does not distinguish between "recognition" and "enforcement" of the arbitral award, and only deals with its approval. Under Section 23 to the Law: the court may, at the request of a litigant, approve an arbitral award. On the one hand, the regulations pertain to the enforcement and recognition of foreign arbitral awards. On the other hand, they prescribe a unique way of doing so - by application for approval of a foreign awards - in court. Even if this constitutes a lacuna, let us refer once more to the parallel law - the Foreign Arbitral Awards Enforcement Law which grants the recognition and enforcement powers to the court alone. We believe that so long as the parties have agreed that the arbitrator will recognize the foreign awards, there is nothing to prevent him from doing so pursuant to such agreement.

Temporary Relief in Enforcing Foreign Awards

The position stated by the Israeli Attorney General is that there is no room to order attachment on a foreign country's assets in Israel in the absence of a party. This, as these assets belong to a foreign country and are partly protected by diplomatic immunity under the 1961 Vienna Convention on Diplomatic Relations, and under international customary law which is part of Israeli law. Court rulings have prescribed the tests for determining the border between sovereign activity by the foreign country which will be granted

diplomatic immunity and private commercial activity which will not be granted such protection.

Registrar's Powers

The powers vested in the court in arbitral proceedings will be vested the registrar in the following matters: 1. powers which he would have been competent to exercise if the claim under arbitration were an action brought in court; 2. appointment of an arbitrator; 3. extension of times under the Arbitration Law; 4. confirmation of arbitration awards and granting relief of attachment, prevention of departure from Israel and providing guarantees, when no application has been filed for setting aside the arbitral award.

The registrar is not authorized to stay proceedings due to the existence of an arbitration clause or agreement.

Section 39 to the Arbitration Law

Under Section 39, the provisions of this law cannot prevent a claim from being filed with the court according to those rights and obligations prescribed in an arbitral award under this law or by a determination made on the basis of an oral agreement. The court has determined that sometimes failure to carry out the award is due to it not being possible to carry out the award as-is, whether because the award is declarative and does not prescribe actionable relief, because a dispute arises regarding its meaning due to the award being unclear, because it is not possible to confirm it for technical reasons, or when it is not possible to confirm the award as the award was given on the basis of an oral agreement or one that does not constitute an arbitration agreement.

Chapter 11 - Appeals

The Arbitration Law (Amendment No. 2), 5769-2008 brought about a substantial change in arbitration proceedings. The option was given to appeal an arbitral award - separate from the grounds prescribed under Section 24 to the Arbitration Law - both by applying to an arbitral tribunal which will convene as an appellate instance, and by applying to the court for leave to appeal. Additional procedures of law which apply to the appellate

arbitrator have been prescribed under the new addition entitled: "Second Schedule (Section 21A)". Separate rules were set forth regarding the application for leave to appeal in court under Section 29B.

Under Section 21A(a) to this addition, if the parties to an arbitration agreement have determined that the arbitration award is appealable before an arbitrator - the arbitrator will give grounds for his appealable award. Furthermore, the provisions of the Second Schedule will apply in addition to the provisions of the First Schedule, so long as these not contradict the provisions of the Second Schedule, and all - unless the parties agree otherwise.

Under the provisions of Section 21A(b), the provisions of the Arbitration Law which apply to the arbitrator, the proceedings brought before an arbitrator and the arbitral award, will apply *mutatis mutandis* to the appellate arbitrator, the appellate proceedings brought before an arbitrator and the appellate arbitral award. The arbitral award for defining "arbitral award" will be the appellate arbitral award or the arbitral award given by the first arbitrator, if no appeal was made or after the time for filing an appeal has expired. Sub-section (c) indicates that if the parties have determined as provided in sub-section (a), their right to apply to court for setting aside the arbitrator's award, or for leave to appeal the arbitral award will be limited as follows: (1) an application for setting aside the arbitral award my be made only on those grounds prescribed in Sections 24(9) and (10); (2) it will not be possible to apply for leave to appeal the arbitral award in court.

Appeals Before an Arbitrator

According to Section 21A to the Law, arbitration proceedings in the appellate instance will be heard by a single arbitrator. However, in a complex arbitration case, the parties may agree to a tribunal of several arbitrators. In appealing to an arbitrator, the parties must determine when formulating their agreement as to the composition of the arbitral tribunal who will hear the appeal, and state the identity of the arbitrators. The benefit of a three-person arbitral tribunal is greater than that of a lone arbitrator in achieving a proper result in complex arbitration cases, and it might be possible to establish a professional

appellate instance with one of the arbitrators, for example, being a professional, such as an engineer or architect. Combining legal and business acumen with an agreement-oriented approach enables the formation of a team with unique examination criteria. Therefore, we believe that it is only proper for the appellate instance to consist of a judge emeritus who will head the court in the appeal, an attorney, and a senior businessman.

A party in whose favor the arbitral award was given is not entitled to appeal the award. In addition, it is not possible to appeal a decision which constitutes good advice to the litigants. It is not possible to appeal an arbitral award which is void by law. Furthermore, if there is concern that the arbitral award will not be honored or that the award being appealed has no real value, the appellate instance will not hear the appeal. Usually, the appeal will be made due to an apparent lapse in judgment or in determining the facts, or due to procedural flaws which affected the outcome of the arbitration proceedings. Therefore, any procedural flaw which cannot affect the results of the proceedings, cannot serve as grounds for an appeal.

The provisions set forth in the Second Schedule to the law dictate the procedure for the route of appealing before an arbitrator, but do not encompass all the matters governing the litigants' actions when filing an appeal. The parties may act as per their agreements, but even these agreements may not encompass all the procedural provisions required in an appeal. Therefore, we believe it both possible and preferable to adopt several of the civil procedure provisions so long as the parties have not agreed otherwise.

Dates in Appeals

Under Section B to the Second Schedule, the appeal will be submitted to the arbitrator within 30 days of the date on which the arbitration award was given to the litigants or from the date of the appellate arbitrator's appointment, the later of the two. The other litigants may submit a detailed reply to the appeal within 30 days of the date on which they receive the appeal. The appellant may file a response to the reply within 15 days of the latter's submission. The parties may stipulate on the Second Schedule and determin such longer or shorter dates than prescribed therein, as the aim of the arbitration system in general - and of consensual arbitration under Section 21A

in particular - is to conduct arbitration as per the parties' intentions and agreement.

Is the appellate arbitrator's judgment to extend the date for filing the appeal limited to "special" causes, as the provision appears in legislation, under the Second Schedule to the Arbitration Law, or is he granted broader discretion?

We believe that the arbitrator's judgment should not be limited to special causes only. This, for two reasons stemming from the nature of the appellate process before an arbitrator. The first reason, is that the arbitration process pursuant to Section 21A is a process whose procedures are determined by the parties' agreement through a detailed agreement made at the very start of the arbitration process. The second reason, is that though the appellate arbitrator serves in a quasi-judicial capacity, but he is not a judge and his considerations in most of the cases whether or not to extend a deadline will not be subject to judicial review.

If an application has been submitted to an appellate arbitrator, he will consider the following: the period of time that has elapsed from the original date of appeal; the reason for this delay; the other litigant's reliance on the arbitral award. A litigant's expectations include the assumption that failure to file an appeal in time indicates that his adversary has waived his right or, at the very least, that the right granted his adversary has expired through his failure to act and the arbitral award is valid. It is important to adhere to schedule, as otherwise it will not be able to conduct orderly arbitration proceedings. We believe that, in general, litigants should be granted extensions. A delay in filing an appeal will not be approved, unless there are good ground to do so and on special occasions - after hearing the application for belated filing of appeal and on the condition that the appellate instance reach its decision after all litigants have been given opportunity to state their opinions.

The appellate arbitrator must make his award within two months of the date on which the appeals process ended. The appellate arbitrator is not authorized to extend the date for issuing his appellate award unless the parties have agreed otherwise in writing. In the first arbitration proceedings, the date for handing down the award is prescribed under the First Schedule to the Law - the arbitrator must make his award within three months from the date on which hearing of the dispute began or on which he was required to begin hearing

the dispute. The arbitrator in the first arbitrator is also authorized to extend the date by a further three months.

Evidence in Appeals

Under Section D to the Second Schedule to the law, the appellate arbitrator may not hear witness testimony. The statement of appeal submitted to the appellate arbitrator will be detailed and can include documents and materials brought before the first arbitrator. Similar to appeals made in court, the litigants may not present new evidence in the appeal. The exceptions to this rule are: when the court in the previous instance refused to receive evidence which it was obligated to receive; the document's presentation or the examination of the witness is necessary in order to enable the court to rule; other important reasons. In this matter, we must distinguish between evidence proving a fact that occurred prior to the award being appealed, and evidence proving a fact that occurred after the award was made. It is possible to allow evidence pertaining to events that occurred prior to the award, if the applicant was not aware of such evidence and could not have discovered them through sufficient effort and assuming that he acted in good faith.

Sessions and Minutes

The arbitrator may hold sessions with the parties present and hear their arguments based on the materials available to the first arbitrator, and no additional arguments which are unrelated to the appeal may be made. Section A to the Second Schedule which accompanies Section 21A prescribing the route for appeals before an arbitrator, states that arbitration sessions will be documented in minutes or by any other means determined by the parties in their arbitration agreement. These minutes will reflect the course of the proceedings and the litigants' statements. It is possible to stipulate that the parties not be obligated to document the proceedings. We believe that the nature of the process and the arbitrator's duty to provide grounds under Section 21A(a)(1) mandate that arbitration sessions be documented. Documentation reinforces the parties' confidence in the process, and promotes full transparency of the arbitration process.

Counter Appeals

The provisions of Section C to the Second Schedule state that the other litigants may file counter appeals within 30 days of receiving the statement of appeal. The other litigants may submit a detailed reply to the counter appeal within 15 days of receivng the latter. The counter appeal will be submitted only on matters stated in the main appeal and must pertain to matters stated in the main appeal and it is not sufficient for the counter appeal to pertain to matters stated in the first instance. When the respondant seeks to protect the arbitrator's decision, he must submit a statement of reply to the counter appeal which includes his reasons. However, if he argues against the award itself that it means changing the decision, then such argument contests the arbitrator's decision.

Finality of Proceedings and Act of Court

If no demand for appeal has been submitted, the arbitral award will be final and binding on the litigants and their substitutes as an act of court. This will achieve certainty and finality in the arbitration proceedings as the right to appeal is not granted to the litigants in perpetuity. If they so desire, litigants must exercise their right within the period of time allotted, and are required to be active in the exercise of their right. However, Section 21A(c) to the Law states that it will be possible to apply for annulment of the arbitration award, despite the agreement regarding the appeal, if there are grounds contradicting public policy or if there are grounds on which the court would annul a final award which can no longer be appealed.

Annulment of the Arbitral Award Given in the Appellate Instance

After the arbitrator (or arbitrators') decision has been received in the appellate instance, the parties may apply for annulment of the appellate arbitral award only on the grounds provided under Sections 24(9) and 24(10), if it has been found that the appellate arbitration proceedings or appellate award are tainted with prejudice, deceit, bribery, etc.

Appeal with Leave of an Arbitral Award Before a Court

Application for leave to appeal is a procedural process pursued by litigants seeking to appeal an award for which no right to appeal is granted, but which can be appealed after receiving leave to do so. This is not a granting of rights, but rather making the right

contingent on receiving leave. The considerations guiding the judge in deciding this issue, are the finality and efficiency of the proceedings versus the search for justice and fair process, The desire to streamline proceedings, prevent excessive litigation and harassing the litigants, and ending the dispute.

This process too, which is a far-reaching innovation in the Arbitration law, is based on the substantive and well-established principle regarding the high level of agreement required of the parties to determine how their arbitration will be conducted, the matter which the parties agreed to submit to arbitrators, and the powers vested in the arbitrator. The parties are further required to be aware that this innovation will not apply if they do not prescribe the necessary conditions in the clause. Meaning, agreement will be expressed in acknowledgement of all terms of the agreement, of the fact that a permissible appellate instance will exist after the award is made and of the First Schedule to the Arbitration Law, including keeping of minutes in arbitration sessions and the arbitrator giving grounds for his award. Due to the large number of details which must be agreed upon, the conditions attesting such agreement must be strict, and so emphasizing the demand for a written arbitration agreement signed by the parties, will attest to the parties' intention and will prevent unnecessary disagreements later on.

Arbitrator Award According to Law

Pursuant to Section 29B to the Law, the parties must explicitly determine the applicable law for the arbitrator. The "Law" as defined in Section 1 to the Interpretation Law, 5741-1981, is the law of the State. If the arbitrator's award is contrary to the law, his award can be appealed.

Fundamental mistake in the application of law - The court will grant leave to appeal an arbitral award only if the arbitrator has made a fundamental mistake in the application of the law. The term "fundamental mistake" is apparently borrowed from Section 14 to the Contracts Law (General Part). The mistake must be such that if made, the arguing party would not have entered into the agreement and the mistake is grave and pertains to the very essence of the transaction. Therefore, not every mistake in the award will be considered a fundamental mistake, but rather only grave, material and so evident a

mistake in the award. The mistake may be a mistake of law or of fact or of the matter submitted to the arbitrator's decision and on which the arbitrator is obligated to respond, or of a matter related to unfair conduct of the arbitration proceedings: if the arbitrator did not hear the arguments of one of the litigants, exceeded the scope of his authority, if additional evidence be uncovered after the award has been made, if the arbitrator ignored an important and substantial piece of evidence. Reliance on the grounds of a mistake in the application of law should be able to be discovered from the documents which served as the foundation for the case and for the arbitrator's explanations.

We believe that the term "fundamental mistake" should be divided into the following fields: mistake in substantive law - in the interpretation of fact or of law - and unfair conduct by the arbitrator in the arbitration proceedings: failure to hear evidence and arguments and ignoring evidence and arguments or issuing an award in total contradiction to evidence. Though the list is expansive and not definitive, we believe these to be the main factors for establishing grave mistakes in the application of law.

Evident mistake in the award - The cases justifying the court's intervention will be mistakes in the arbitrator's award which clearly and unequivocally affect the outcome of the award, leading to distortion of justice. One of the ways to recognize fundamental mistakes in the application of law or of fact, is to discover such mistake in the arbitrator award (the result), but it can also be found from mistakes outside the award itself - which can be found in the documents on which the arbitrator award relies.

The scope of review - The provisions of law regarding an apparent mistake in the award originate in British law and was used by the court to review arbitral awards. Usually, the arbitrator was not obligated to give grounds for his award, but if he did, it was possible to annul the award due to an apparent mistake in the award. These grounds were adopted by the court in Israel for reviewing arbitral awards made under the 1926 Arbitration Ordinance. It was not long before the court departed from British practice and ruled that judicial review will encompass all legal mistakes, whether apparent or hidden.

In formulating the new amendment to the Law, we used the addition of grounds for review under Section 29B to the Law in order to allow a broader review than that applied to arbitral awards in the main action, while still achieving review that is more limited

than that which applies in ordinary appeals. It stands to reason that the proper interpretation of the grounds regarding the apparent mistake in the award for reviewing the arbitral award matches the practice that was common in England in the 1950s, as well as in Israel, at least as regards review of arbitral awards. However, there is justification in expanding the scope of review of arbitral awards and allowing a legal discussion of the award and its grounds. A detailed award with grounds enables verification that the provisions of law in general, and the provisions of Section 29B to the Law in particular, are properly applied. This justification stems from the fact that the parties have given their broader agreement to this control when they agreed to an appellate instance which will review the arbitral award if it contain a grave and fundamental mistake in the application of law and causes a distortion of justice.

The difference between reviewing the arbitrator's award under Section29B to the Law, when a fundamental mistake is uncovered in the application of law which is apparent in the award, and reviewing the award through ordinary appeals is that the court is not authorized to intervene in the arbitrator's award unless the mistake is fundamental, severe and apparent in the award and the documents in the case to the point of causing distortion of justice. This is the difference between supervision jurisdiction and appellate jurisdiction. Although this difference cannot be clearly defined, the difference is very real.

Conduct unbefitting the proceedings - Improper or unfitting conduct by the arbitrator, whether intentional or otherwise, may lead to a fundamental mistake. For example, when the arbitrator determines a finding which is not backed by the evidence brought before him, this is a less apparent mistake, but one which can be proved through testimony. Failure to hear the litigants' arguments also, ultimately, leads to the arbitrator ignoring evidence and facts which may turn out to be true and necessary for reaching the final result and proper application of law.

Even if the parties have agreed that the arbitrator decide according to law and the arbitrator made a fundamental mistake in the application of substantive and procedural law, this will not suffice to enter the appellate instance if no distortion of justice occurred.

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A distortion of justice is a distorted and unreasonable decision which causes discrimination and injustice. Defining the term "distortion of justice" is no simple task and may even be impossible in light of the broad spectrum of circumstances, which change with each case and matter. It has already been said elsewhere that the test for determining distortion of justice is an objective one.[50] Today, after the enactment of Basic Law: Human Dignity and Freedom, it is especially important to establish tests for determining distortion of justice, as it is necessary to examine the right to appeal and the function of the appellate instance from a constitutional point of view. A consequential test will not suffice for determining distortion of justice, and another test must be defined which is independent of the defect's influence on the results of the process.

Application for Leave to Appeal

An application for leave to appeal is a procedural process pursued by a litigant seeking to appeal a decision for which he is not granted right to appeal, but which can be appealed after receiving leave to do so. This is not a granting of rights, but rather making the right contingent on receiving leave. It is not possible to give an exhaustive definition for the types of cases in which leave to appeal will be granted, but this mainly pertains to matters of constitutional and public import, matters in which contradictory decisions are given by lower instances and which have yet to be ruled by the highest appellate instance.

The application and details thereof - The application for leave to appeal must be submitted to the competent court, in writing, in four copies and with a sufficient number of copies for service to the respondents. The application will summarize the grounds for the appeal and will state the relevant references. There is no need to attach an affidavit to the application. The documents which must be attached are the certified copies of the arbitrator's decision, proposal of collateral instead of guarantee, if the appellant so wishes, notice of deposit of collateral or of provision of guarantee.

Dates - The legislator did not state when the application for leave to appeal an arbitral award is to be filed, and so we must look to Regulation 399 to the Civil Procedure Regulations, which states: "If legislation provides for the application for leave to appeal a

[50] Criminal Appeal 4461/01 **Rodman v. State of Israel**, Ruling 57(5) 25, pp. 43-44 (2002).

decision but does not expressly provide for the date of submitting the application, the application will be submitted within thirty days of the decision."

Deposit of collateral - Upon submitting the application, the applicant must deposit guarantees or collateral to guarantee the respondent's expenses in the application and the appeal. Deposit of the guarantee or collateral along with filing the application exempts applicants who receive leave to appeal from providing guarantees upon filing the appeal itself.

The respondent's reply - If the court has decided that the application does not require a reply, the application will be denied immediately. If the court decides that the application requires a reply, the court may order that arguments be presented orally or that a reply be submitted in writing within 15 days from service of the application to the respondent. The reply will state the references on which the respondent relies. After receiving written reply from the respondent, the court may order additional arguments to be presented either orally or in writing.

Decision to Grant Leave to Appeal

If the court has decided to grant leave to appeal, it may then hear the application for leave to apply as though leave had been granted. Pursuant to Section 29B(c) to the Law, after the appeal is granted, the litigants may present arguments regarding the annulment of the arbitral award under Section 24 to the Law.

Arbitrator's Status in an Appeal of a Decision Setting Aside the Arbitral Award

Can an arbitrator, of his own accord, appeal a decision setting aside the arbitral award? The court answers this in the negative. It seems that a person who was not a litigant in the formal sense of the word in the proceedings held before the first instance, may contest decisions reached in his regard in that process by filing an independent claim, and the decisions reached in said process will not serve as an act of court regarding that person. The only means of contest permitted by the court to a party who was not part of the proceedings, is through filing an independent action.[51]

[51] Application for Leave to Appeal (Tel Aviv District) 4887/96, Motion 4888/96 **Ben Ato v. Elkalai and others**, District Rulings 5756 (3) 62 (1996).

Between Appealing and Annulling the Arbitral Award

Precedent dictates that the arbitral award can be annulled subject to two cumulative conditions: 1. if one of the grounds for annulment prescribed under Section 24 to the Arbitration Law is met; 2. these grounds have caused a distortion of justice.

In short, we will refer to the principle apparent throughout court rulings, which distinguishes between an appeal of the arbitrator's award and its annulment: the court considers the ten grounds for annulment prescribed under Section 24 to the Arbitration Law a definitive list which alone can cause the court to intervene in an arbitral award. A mistake in the award is not listed among the grounds for annulment[52]. Section 24 exhausts all the grounds for annulling an arbitral award, and no other grounds can be added. Therefore, examination of the arbitral award is **not** carried out based on criteria used to examine the ruling of a judicial instance.

Chapter 12 - Limitation

In examining the cases where the matter of limitation arises, we must first examine the grounds on which that question is based. These grounds have been reviewed in court rulings[53]: **First**, the evidential explanation which pertains to the difficulty in maintaining evidence and documents for prolonged periods of time. In this respect, the purpose of the limitation period is to limit the time which a person is required to maintain his evidence. **Second**, it holds true that a delay in filing a claim for a sufficiently long period of time indicates willingness to waive the substantive right. **Third**, the need to grant the defendant certainty regarding his rights and duties, and to protect his interest of reliance. Failure to seek legal action for a long period of time creates the representation on which the defendant may rely and act, to his detriment. In addition to the three grounds mentioned above, which focus on the litigants, there is another grounds for limitation which pertains to the public interest. The public has an interest that the limited time resource of the courts be dedicated to handling current problems and not matters that have become outdated.

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[52] Civil Leave for Appeal 5991/02 **Gwirtzman v. Freid**, Ruling 59(5) 1 (2004).
[53] Civil Appeal 7401/00 **Yehezkeli v. Adv. Gluska**, Ruling 57(1) 289, 300-301 (2002).

Stay of Proceedings Versus Limitation

Section 5 to the Law discusses the matter of stay of proceedings in court in the event of an arbitration agreement. In cases where an application for stay of proceedings is heard, in which limitation has been argued, we must determine what came first. Should we first discuss the question of limitation, or should we first discuss the argument regarding arbitration. We believe that the provisions of Section 2 to the Limitation Law does not bar the application of Section 5 to the Arbitration Law. Section 2 to the Limitation Law prevents the court from "needing" a claim due to limitation, as the court is prevented from deliberating that claim. The argument of arbitration is not a defense argument, but rather a procedural argument, which is aimed at submitting the dispute to another forum out of court. As the argument of limitation is a material defense argument, it is fitting that it also be submitted to the arbitrator for decision. Once it has been decided to submit the dispute for decision through arbitration, the parties have also granted the arbitrator authority to decide on the defense arguments that can be brought against the action.

Relief Against Lapse of Rights

Section 7 to the Arbitration Law deals with relief against lapse of rights. This section states that: (a) when an agreement between the parties provides that the initiation and termination of arbitration proceedings within a specific period shall be a precondition to the realization of a right between them, and if a dispute arises between the parties, then the court may, if it considers it just to do so, extend the period, even if it has already expired on such conditions as it may think fit. (b) When the court decides that a dispute shall not be dealt with by arbitration, then any stipulation in the agreement between the parties, which makes the initiation and termination of arbitration a precondition of the realization of a right between them, shall be void. It is sometimes customary to add another clause which shortens the limitation period prescribed by law. Section 7(b) is aimed at preventing these cases, as the clause may cause distortion of justice if the claimant was delayed through no fault of his own.

Appointment of Arbitrator

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The court will only appoint an arbitrator, pursuant to Section 8(a), after the applicant has given the other litigant written notice and has not received an answer within seven days of such notice being served.

Limitation Period After Removal of the Arbitrator

One of the questions discussed in court rulings is whether, when the court has decided to remove the arbitrator pursuant to Section 11 to the Law, and the court and the parties have not appointed another arbitrator, the countdown to limitation of the grounds of the claim begins. Precedent has expanded the scope of Section 15 to the Limitation Law, as part of the recognition of access to court as a basic right.

Arguing Limitation Before the Arbitrator

The Limitation Law includes arbitrators in its definition for "court". Therefore, in arbitration proceedings it is also necessary to argue for limitation, which is a material argument, during the pre-arbitral proceedings if possible, or at the first opportunity during arbitration.

Extension of Periods for Acts of Arbitrator

Extending the periods for acts of the arbitrator is governed by Section 19(a) to the Arbitration Law. This section states: "When an arbitration agreement or this Law prescribes a period for awarding the arbitration award or for some other act of the arbitrator, the court may - on application by a party or by the arbitrator - extend the period from time to time to such a period as it shall prescribe, even if the preceding period has already expired". Thus, the parties may agree to extend the period for awarding the arbitration award and the court may likewise do so as per its own discretion, if it find that there was no delay in applying to the court and that the parties did not, through their conduct, indicate that they are no longer interested in continuing litigation.

The Arbitrator's Award

Section 25 states that if the court hears an application to set aside or confirm the award, and finds reason to remit the award to the arbitrator, the arbitrator will make his award

within a period of three months from the date of the decision, unless the court direct otherwise. Under the First Schedule to the Law, the arbitrator may extend the period for making his award and of his authority once even without the parties' agreement to such extension, unless the parties have explicitly stipulated in this matter.

Under Section O, the arbitrator must give the arbitration award within three months of the date on which he began hearing the dispute or on which he was required to begin hearing the dispute by written notice from a litigant, the earlier of the two. However, the arbitrator may extend the period by up to three additional months. Section S states that the arbitrator must keep the arbitration file for seven years after the end of the arbitration proceedings.

Reservation of Rights and Duties After Receiving the Award

Section 39 to the Arbitration Law dictates that a claim can be filed pursuant to the arbitrator's award. For example, arbitration was held between the parties and an arbitration award given. One of the parties to the arbitration proceedings believes that a certain matter which it has argued is included in the arbitral award, but as the award only set forth principles for calculating expenses but has not prescribed (and perhaps could not have prescribed) specific sums to be paid, the matter of specific payment still requires decision. Therefore, in order to implement the arbitration award, it is necessary to determine the specific amount due of the other party.[54] This begs the question of when the countdown to limitation for filing the claim begins. We believe that the effective date shall be neither the date of the agreement nor the date of the award, but rather the date on which the obligation to follow the award was violated, from which date the limitation period will be counted.

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[54] Civil Leave for Appeal 751/05 **National Coal Supply Company Ltd. v. "ZIM" Israel Navigation Company Ltd.**, Pador 05(20) 560 (2005).

Section 3 - International Arbitration and Comparative Law

Chapter 13 - International Arbitration

One of the most important process to take place in recent years is globalization. Globalization has led many companies and businessmen in Israel to operate in the global village, and this development has led to the sophistication of the agreement system. In this context, due to the fast-paced nature of the business world, businessmen tend to settle disputes as soon as possible, with the speed and efficiency in which the arbitration institution excels. The principles of international arbitration are protected under international commercial law and under the principles of arbitration law. In this manner, businessmen know how they must act in the event that a dispute arises, and how they can focus the dispute and resolve it.

The Advantages of International Arbitration

When considering why it is preferable to settle business disputes through commercial arbitration, instead of submitting them to court, we can note several key advantages:

Protection of privacy and non-exposure - Commercial arbitration is a private process, carried out at the parties' convenience, according to the terms set forth by the parties themselves, and without the details of the dispute ever leaving the arbitration room. Even if the parties appeal the arbitrator's award, the appellate instance will continue to maintain this nature of the proceedings - protection of privacy to the full extent possible.

Selecting a consensual arbitrator - Today's arbitration proceedings grant the parties the possibility of selecting the person who will decide their dispute. Furthermore, the parties can mutually consent to an institution or other entity who will appoint the arbitrator. We propose that in arbitration proceedings, it is recommended that the arbitral authority consist of a judge emeritus who will head the proceedings, an attorney or accountant with expertise in business in general, and in the specific field of the dispute, and an expert

businessman from the same areas as will be discussed in the arbitration proceedings. This will ensure proceedings that are devoid of any pressures related to the dispute, which will be overseen by people who are fluent in economics and business, both in Israel and abroad.

Decision based on professional legal-commercial judgment - Each system comes with rules of its own. Business conduct differs from legal conduct. Arbitrators who are well-versed in business, and not just law, or a team of arbitrators with backgrounds in both worlds, are better suited to incorporate business considerations in their award. Exercising legal-commercial judgment may yield a more complete and worthy award, which will reflect the justice carried out for the parties. We believe that the great advantage of commercial arbitration is in this balance, which will also reinforce the confidence of the commercial world in the arbitration institution, and form an inseparable bond between the two.

Considerations of efficiency - The business world moves fast. One transaction follows another. Efficient handling of crises is crucial. An efficient judicial process means quick understanding of both the main points and finer points of the dispute. Efficient conduct is important for reaching a worthy outcome. This conduct is expressed in conducting sessions continuously and frequently. It is expressed in the simplification of processes and the removal of procedural obstacles. Efficient and coordinated conduct of the preliminary proceedings, such as disclosure of documents and interrogatories, will save many months of litigation. As such, it is essential that the arbitration award too be made as near as possible to the end of the necessary arbitration proceedings.

Development of Arbitration Proceedings in Internatioanl Investment Disputes

Ever since the liberalization of the control over foreign currency and the evolution of the modern Israeli economy, Israeli investors and corporations have been investing substantial sums of money abroad. Oftentimes, these investments are made in countries with unstable governments and corrupt officials, and political or economic upheavals can easily transform promissing plans to protracted nightmares of economic quagmire.

Sometimes, trouble comes from another local investor with political ties who manages to leverage the corrupt system and take over the foreign investor's assets. In these cases, the foreign investor is not granted adequate protection and he certainly cannot seek relief through the corrupt legal system. This outlines the important role of international arbitration. A foreign investor who believes that his investment has been injured through the act or ommission of the local authorities in the country of investment, can sue the country in one of the following four cases: (a) if the investment agreement signed by the foreign investor and the host country includes an arbitration clause, whereby the investor may sue the state through the international arbitration chosen in the agreement. (b) in the event of an applicable international convention protecting investments and the host country has signed such convention. (c) if the host country has enacted a law obligating the state to submit to international arbitration in the event of a dispute with a foreign investor. (d) if the host state has agreed, after the dispute has arisen, to litigate with the foreign investor through arbitration.

There are more than 2000 international conventions protecting investments. Israel has signed such conventions with about 30 other countries. Many of these conventions include provisions regarding the submittal of all legal disputes that arise between an investor from a contracting state and the other contracting state for decision through arbitration.

Let us illustrate the concept through a real-life case study from commercial arbitration in Romania and the Balkan states:

An Israeli company signed an agreement for construction of energy infrastructure in Romania. The project involved a substantial investment and entailed great risk to the Israeli investor. Another risk was the inefficient government system and court instances. The government could be influenced by local parties, which would be detrimental to the Israeli investor. The Israeli investor can protect its investment by adding an arbitration clause to the agreement signed with the Romanian government. This arbitraiton clause should state: (a) the entity which will hold the arbitraiton proceedings, e.g. - the ICC or

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ICSID; (b) the identity of the arbitrators, e.g. - professional arbitrators fluent in the field of the dispute.

Israel's Subscription to the New York Convention

The New York Convention harnesses the judicial and enforcement systems of its member countries for enforcement of arbitration awards. The convention creates a unique judicial authority for arbitration proceedings which are based on valid arbitration agreements. It supercedes Israeli law, and any law violating its provisions will be rendered void.

Stay of arbitration proceedings pursuant to Section 6 of the Arbitration Law - Today, an arbitration clause appears in virtually every international trade agreement, and arbitration is used for the resolution of disputes between businesses which have undertaken import, distribution, licensing, or representation agreements in another country. If a business dispute arises between the parties, it begs the question of what constitutes the suitable forum for hearing the dispute.

Article 2 to the Convention[55] refers to stay of proceedings, and states that: (1) each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration;. (2) the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams; (3) the court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds the said agreement is null and void, inoperative or incapable of being performed.

Section 6 to the Arbitration Law dictates: "When an action is brought in court in a dispute which it had been agreed to refer to arbitration, and if an international convention to

[55] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. The Convention was signed in New York on June 10, 1958 and is valid for Israel since June 7, 1959.

which Israel is a party applies to the arbitration and that convention lays down provisions for a stay of proceedings, then the court shall exercise it power under Section 5 in accordance with and subject to those provisions."

The court's discretion in an application for delay of proceedings by force of convention - It is evident that Article 2(3) to the Convention lists extraordinary cases where the court will not refer the parties to arbitration: when the agreement is rendered null and void, inoperative, or incapable of being performed. Except for those cases, the court will not interfere and has no discretion in the matter. Israeli courts are obligated under Section 6 to stay proceedings and refer the parties to the arbitration process determined in the agreement, except for a finite list of extremely exceptional cases. This means that under Section 6 to the Law, along with Article 2(3) to the Convention, the court has very limited room to maneuver as compared to the court's options under Section 5 to the Law.

Considerations of certainty and concerns for failure to honor international arbitration agreements, due to the preference of the interests of local litigants, have indeed led foreign judicial instances to adopt an interpretive approach which restricts discretion regarding the stay of proceedings pursuant to international arbitration agreements. There are weighty considerations supporting not staying proceedings in cases where some of the litigants are not party to the arbitration agreement. However, it is extremely important that uniform rules be set down and adhered to in enforcing international arbitration agreements.

Enforcement of Foreign Arbitration Awards Under Section 29A to the Law

If the arbitration proceedings were held outside of Israel and an arbitration award was made, that arbitration award constitutes an act of court between the parties but is not immediately enforceable. If we wish to enforce such an award in Israel, we must apply to a court in Israel which would render that award enforceable and executable in Israel. The claimant applying to enforce the foreign award is granted the following options: enforcement by filing an ordinary action under Section 29, or enforcement under the New York Convention.

The Grounds Set Forth Under Article 5 to the New York Convention

The key article of the New York Convention is Article 5, which determines the grounds on which the court can refuse to enforce the artibration award. Article 5(1) to the Convention lists the grounds which must be proven by the respondent objecting to the enforcement, while Article 5(2) to the Convention lists the grounds that the court of law in the country where enforcement is requested is entitled to state of its own accord. The list of grounds provided under Article 5 is finite.

The grounds under Article 5(2) which the court may raise of its own accord, and which when fulfilled - may refuse enforcement of the arbitration award, are as follows: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country where enforcement is requested. Let us assume that an award was given in England on a matter which cannot be resolved in arbitration in Israel. In this case, the court may state that it is not willing to enforce the award; (b) the recognition or enforcement of the award would be contrary to the public policy of that country where enforcement is requested.

According to Section 29A, an application for approval or annulment of a foreign arbitration award which is subject to an international convention to which Israel is party - and the convention sets forth provisions in the matter - will be submitted and heard according to and subject to such provisions. While the court deliberating the annulment of the arbitration award under Section 24 to the Arbitration Law is granted discretion to choose between the options "**to set aside the arbitration award, in whole or in part, or supplement or amend it, or remit it to the arbitrator...**", the court's authority is limited when dealing with approval of foreign arbitration awards, to either approving or rejecting the application for approving the arbitration award (Article 5 to the Convention).

Regulations for the Execution of the New York Convention (Foreign Arbitration), 5738-1978

These regulations were aimed at implementing the Convention, and so it was decided that they "shall be interpreted with the Convention" (Regulation 2). Auxiliary legislation applies the Arbitration Procedure Regulations, 5728-1969, to the extent that they not include any provision which contradict the Regulations for Execution of the Convention, and *mutatis mutandis*.

The Arbitrator's Authority to Decide on the Validity of Foreign Arbitration Awards

It has been argued that the Arbitration Law does not grant an arbitrator the authority to recognize or accept a foreign arbitration award, and that if the arbitrator shall do so, he will exceed his authority under Section 24(3). The law reserves this authority to the court. Under the circumstances in which this argument was made, the arbitration awards were subject to the provisions of the New York Convention, which dictates that foreign arbitration awards require court approval in Israel. On the other hand, it was argued, that one must differentiate between "recognition" of the foreign arbitration award and its "approval" for enforcement purposes. "Enforcement" is required for executing the award, while "recognition' is aimed at creating an act of court between the parties. The New York Convention does not deal with recognition, but with enforcement. It was further argued that the authority to recognize is not given exclusively to the court.

The applicable legislation in this matter is the Foreign Judgments Enforcement Law and the Arbitration Law. Does the Arbitration Law grant the arbitrator authority to decide the validity of foreign arbitration awards? Indeed, the Arbitration Law does not differentiate between "recognition" and "enforcement" of the arbitrator's award, and only deals with its approval. Section 3 of the New York Convention Regulations dictates that a litigant requesting that the court approve a foreign arbitration award must append his application with (1) the original arbitration award duly verified according to Israeli law, or a certified copy thereof; (2) the original arbitration agreement or a copy thereof duly certified according to Israeli law.

On the one hand, the regulations deal with enforcement and recognition of foreign arbitration awards. On the other hand, they prescribe a unique manner of doing so -

through application for approval of the foreing award - in court. Even if this constitutes lacuna, we will refer once more to the corresponding law - the Foreign Judgments Enforcement Law which grants recognition and enforcement authority to the court alone. One could ask, whether the parties may consensually grant such authority to the arbitrator. Precedent states that it is not possible to do so. However, we believe that so long as the parties have agreed that the arbitrator recognize foreign awards, there is no obstacle to the arbitrator discussing the matter if the parties so agree.

Temporary Relief in Enforcement of Foreign Awards

In this matter, we must differentiate between governmental activities by the foreign country, whose assets are to be foreclosed, which will be granted immunity, and private commercial activities, which will not be granted immunity.

Conclusion:

Globalization, the evolution of the internet, the explosion and sophistication of the means of communication and transportation, have jointly created a new reality where the world is transforming into one global country housing a multitude of states and cultures. The business world moves fast, and efficient crisis resolution is essential.

International commercial arbitration is an obligating legal process. In actuality, the 1958 New York Convention renders arbitration awards more obligating than foreign court rulings. Furethermore, temporary relief is granted much more readily under internanational arbitration.

Resolution of business disputes through arbitration is preferable to litigation in court, both due to the great workload borne by the courts, due to the convenience offered by the arbitration process, and due to commercial confidentiality being maintained in arbitration through the arbitrator's professionalism.

International commercial arbitration with an appellate instance will offer high levels of flexibility and certainty. International consensual arbitration proceedings require in-depth

and precise knowledge of the procedural and substantive laws of the country where arbitration is being held.

We recommend that prior to resorting to international arbitration, one must determine the relevant conditions in the agreement both explicitlly and clearly. It is necessary to decide on consensual arbitration, which will be held in a friendly country, but it is also necessary to verify that the country where the arbitration proceedings will be held has signed the relevant arbitration conventions,[56] to determine the aribtrator's authorities, and whether or not the arbitrator's decision will be binding for all intents and purposes. A broad agreement must be formulated stating that the arbitrator's award will be legally valid and binding for both parties. In formulating the agreement, it is necesary to include the arbitrator's obligation to explain his award, the appellate instance, the location of the arbitration proceedings, the language in which these proceedings will be held, the applicable substantive law, the procedural law, the manner in which the process will commence, and the manner in which the arbitrators are to be appointed.

Chapter 14 - Comparative Law - Appeals and Reasoning In Arbitration Proceedings In Various Countries

Canada

Canadian law is based on federal law and on parallel law for the various districts. Section 45 to the 1991 Arbitration Law in Ontario, Canada provides for the right to appeal an arbitration award. This section is cogent and deals with obtaining court leave to appeal a legal question.

According to this section, as the arbitration agreement does not deal with the appeal of legal questions, each party may appeal the arbitrator's award to the court as regards a legal question, provided to obtaining the court's permission. The court's permission in these cases will be given on two cumulative terms: a. the importance of the matters in

[56] For example, Section 1(3)(a) to the agreement between the Government of Israel and the Government of the Republic of Estonia for promoting investment and mutual protection thereof (Conventions 1318, Vol. 45).

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arbitration for the parties justifies the right to appeal; b. the decision in the appeal may significantly affect the parties' rights.

If the arbitration agreement provides for a right to appeal the arbitration award before the court as regards a legal question, the litigants will be granted this right without being required to meet any special conditions. Moreover, in their arbitration agreement, the parties may provide for the right to appeal the arbitration award before a court regarding questions of fact or issues combining questions of fact and legal questions arising from the arbitration award.

England

Section 58 to the British arbitration law is a declarative section regarding the right to appeal arbitraiton awards. This section dictates that so long as the parties have not agreed otherwise, the arbitration award made by the arbitration tribunal pursuant to the arbitration agreement shall be final and shall bind the parties or their substitutes. However, this will not affect the right of a person to contest the arbitration award through an appeal or re-examination. This section implies that the litigants may appeal the arbitration award. They are entitled to opt for this route to exercise their right in one of two ways: 1. agreement regarding the right to appeal which will usually be included in the arbitration agreement; or 2. exercising the right to appeal under the provisions of the arbitration law.

In contrast to Israeli law, British law does not impose a series of mandatory duties on the first appellate instance when the parties have mutually agreed on the right to appeal. British law deals with the appeals process itself. An arbitration award which is not explained, as per the arbitration agreement, will not be appealable to the court.

British law prescribes the minimum conditions for filing an appeal, including an option to appeal granted by the court.

This option will be granted on several conditions: the court's decision regarding the appeal will materially affect the rights of either party; the legal question has indeed been brought before the tribunal for decision; based on the tribunal's factual decision, its legal

conclusion is clearly wrong or encompasses a question of public import or the tribunal's decision will raise, at the least, a significant doubt; despite the parties' desire to resolve the dispute through arbitration, justice and circumstances call for the matter to be decided by a court of law.

We believe that British law presents obstacles that are too numerous and complex for realizing the litigant's right to benefit from the right to appeal as far as appeal to the court is concerned. However, as we are dealing specifically with the right to appeal to a court, one can understand why the legislator opted to raise such obstacles, as the litigants may themselves agree to an appellate instance which will be much more accessible than the courts system.

It is important to emphasize that the British arbitration law also provides options for amending the arbitration award, to Section 57, and in this matter the litigants are given significant autonomy. The law also provides the possibility of contesting the arbitration award on grounds of material irregularities, which include, *inter alia*, exceeding authority, deviating from the arbitration agreement, obtaining an arbitration award through fraud, and other grounds besides. It is interesting to note that the court may return the award to the tribunal or cancel it, or declare it to be void. In the latter two cases, the court is required to exercise judgment in order to conclude that under the circumstances it would not be appropriate to return the matter to the tribunal for discussion.

Thus, British law grants the right to appeal an arbitration award. A consensual right to arrange for an appeals process according to such grounds as agreed upon by the parties, including legal errors and factual errors. Under certain conditions, a serious appeals process can also be held before a court of law. Under certain conditions, it is even possible to conduct a private and public appellate instance, but this pertains only to extremely rare cases. It seems that the British legislator recognized the importance of the change experienced by the business sector, and has known to adapt the legal system accordingly.

From British law, as well as from the provisions of law dealing with the possibility of reviewing arbitration awards, we can see the distinction made between an appeal pertaining to material errors pertaining to the legal decision (for example, in British law: a factual error as well as an essentially technical error pertaining to clerical errors, etc.), and the possibility of supplementing the arbitration award as regards a question requiring decision which was not decided in the award. This ground can be attributed both to the technical amendment part, and to the amendment under Section 22 which deals amendment of arbitration awards when it seems that such award should be recognized under Section 21(a) to the arbitration law.

France

By default, civil procedure code in France determines the right to appeal an arbitration award. Under Section 1482, the arbitration award can be appealed unless the parties have waived this right in their arbitration agreement. However, if the arbitrator was authorized to serve as *amiabe compusi tell* (apparently, an arbitrator agreed upon through compromise), the parties will be required to expressly maintain their right to appeal the arbitration award. If they fail to do so, they shall be regarded as having waived this right. The appeals process is the only way to re-examine the arbitration award with the aim of reviewing it or setting it aside. If the arbitrator has been authorized as an *Amibabe Copositeur*, the judge with this right shall likewise be authorized in the appeal.

We can see that French law positively declares the right to appeal an arbitration award before the court. It is possible that had Israeli law declared this right through legislation a long time ago, even if the right not be given to appeal to a court of law, this would have contributed to the development and flourishing of the arbitration process in Israel.

Contesting an arbitration award will be possible in those cases and on those terms as when contesting judicial decisions, as the grounds for appeal are similar to those possible for judicial decisions.

Australia

The 1984 Commercial Arbitration Law, effective in Australia and Wales, provides for the appeal of an arbitration award concerning legal questions. The appeals process is brought directly before the Supreme Court. The right to plead is granted to both parties. There are two conditions for filing an appeal: the agreement of all other parties to the arbitration agreement; obtaining court permission subject to Section 40 of the law.

The court will only grant the right to appeal if it believes that, under all circumstances, its decision in the legal question may materially affect the right of one or more parties to the arbitration agreement, and: a. a legal error has occurred in the arbitrator's award; b. there is sound testimony that a legal error has been made in the decision of the arbitrator or the final adjudicator, and the court's ruling will have a material effect.

Similar to the French example, the right to appeal does not prevent the possibility of canceling the arbitration award. In contrast to the legislation in various important countries, there are laws and codes for arbitration which do not include the right to appeal, but make do with the possibility of amending the arbitration award - similar to Section 22 of the Israeli Arbitration Law - and canceling it on various grounds, some of which appear in Section 24 to the arbitration law.

The United States

The Federal Arbitration Act authorizes the court to cancel arbitration awards pursuant to Section 10. Section 11 to the law deals with the court's authority to amend the arbitration award, on the grounds of mathematical errors, errors in describing a person or object or property appearing in the arbitration award. An interesting amendment pertains to situations where the arbitrator has ruled in a matter which was not submitted to him, except if this matter does not affect the parties' rights in his decision, or the arbitrator's award is incomplete and cannot influence a disputed matter, as he has not given any decision in such matter.

From reviewing the UNCITRAL arbitration rules, we see that they too include the possibility of interpreting the arbitration award, amending it and even supplementing it

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with another award which will supplement the arbitrator's decision if this decision is required in undecided disputes brought before the arbitrator. These important directives do not include any possibility of appeal

The same holds true for the ICC Rules of Arbitration, which dictate in Section 30 the means of amending and interpreting an arbitration award. However, the arbitration codes are subordinate to the law, as provided in Section 17 to the law, which may provide for the appeal or annulment of the arbitration award. This is of great relevance to us, as Israel too sets forth obligatory rules which will apply when litigants opt to pursue arbitration with an appellate instance. Let us assume that the parties to the arbitration adopt the ICC rules and that arbitration will be held in Canada and deal with Canadian issues. Canadian law provides for a right to appeal on legal matters, even if the parties did not provide for this issue, and so along with implementation of the ICC rules, the rules for appeal will also apply.

Conclusion

As we have seen, these four Western countries have a common legal element when it comes to resolving disputes outside of court, and have adopted the supervision structure which is among the foundations of the legal institution, including a private or public appellate instance.

In Canada - In Ontario, the provisions lay out a broad spectrum of cases where it is possible to appeal the arbitration award. It is possible to ask the court's permission to appeal a legal question. If the arbitration agreement states that the parties may appeal the arbitration award before the court as regards a legal question, the litigants will be afforded this right without being required to meet any special conditions.

In England - It is possible to appeal the arbitrator's award as regards a legal question, and the litigants are free to agree that the arbitrator be authorized to amend the arbitration award, clarify it, remove matters which are unclear, or make another arbitration award.

In France - It is possible to appeal under similar grounds as those for contesting judicial decisions. It is also possible to set aside the arbitration award concurrently, when the matter pertains to procedural propriety.

In Australia - It is possible to appeal a legal error made by the arbitrator, but it is also necessary to provide sound testimony that a legal decision which is material to the commercial law has occurred in the arbitrator's decision, and like in France, an arbitration award may be set aside.

In the Unites States - In Pennsylvania, arbitration is mandatory for disputes up to 50,000 dollars, with an automatic right to appeal the arbitration award. A center for arbitration was established in Philadelphia, and New York offers the possibility of appealing an arbitration award pertaining to unemployment fees.

Most countries have instituted methods of supervision of arbitration awards, a fact which contributes to the stability and certainty needed by businessmen operating in the global village.

With the passing of the amendment to the Arbitration Law (Amendment No. 2), 5769-2009, initiated by the author, Israel has joined other Western countries which have instituted arbitration proceedings with private and institutional supervision of the arbitrator's award.

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