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The International Comparative Legal Guide to:

International Arbitration 2009

A practical insight to cross-border International Arbitration work

Published by Global Legal Group with contributions from:

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Israel?

The term "Arbitration Agreement" is defined in the first Article of the Israeli Arbitration Act - 5728-1968 (hereunder: "**The Arbitration Act**") as a "written agreement that refers a dispute which has arisen between parties to the agreement or which may arise between them in the future to arbitration, whether an arbitrator is named in the agreement or not". An arbitration agreement should be in writing but the signature of the parties is not required. No specific title or language is required in order for an agreement to be construed as an arbitration agreement. An arbitration agreement may be amended orally. The arbitration agreement does not need to be in a separate agreement. It usually appears in the form of an arbitration clause within the framework of a commercial agreement. General principles of contract law apply, with very few exceptions, to arbitration agreements. An arbitration agreement in respect of a subject-matter that cannot be the subject of arbitration proceedings in Israel is invalid (see the answer to question 3.1 below). The parties are free to agree in the arbitration agreement on the procedures that will govern the arbitration.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

The Arbitration Act does not draw any distinction between corporate entities and individuals and no special requirements or formalities are required when an individual is a party to a commercial agreement that contains an arbitration clause.

1.3 What other elements ought to be incorporated in an arbitration agreement?

Other than the need for writing, as mentioned in the answer to question 1.1, there are no other elements that must be present in an arbitration agreement. The Arbitration Act has a schedule (the "**Schedule**"), which contains a set of standard rules that govern arbitration proceedings ("**Standard Arbitration Rules**"). Unless another intention is inferred from the arbitration agreement, the agreement is deemed to incorporate all relevant rules in the Schedule other than those rules that are inconsistent with any provisions of the arbitration agreement. In international arbitration agreements it is recommended, however, to provide the basic principles that will govern the arbitration proceedings (such as place of arbitration, governing law, language, number of arbitrators and the method of their selection).

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

Israeli courts are overloaded and there is a significant backlog of civil cases. In order to ease the workload, the Israeli judiciary is constantly looking for effective ADR. Arbitration is considered as an effective tool to settle commercial disputes outside the courts and, therefore, the Israeli Courts have been consistently supporting and encouraging arbitration. Hence, the courts will usually enforce arbitration agreements by staying the proceedings in court and referring the parties to arbitration (Article 5 of the Arbitration Act). When an international convention to which Israel is a party applies to the arbitration, and such convention provides for a stay of proceedings, the court will normally stay the court proceedings (Article 6 of the Arbitration Act).

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

The courts encourage the adoption of ADR measures, such as arbitration and mediation, in order to resolve disputes outside the court system. According to a recent amendment to the Israeli Civil Procedure Regulations, the parties to a court action must attend, before the first pre-trial hearing in the case, a preliminary session with a mediator, to explore the option of mediation in the action, but the parties are not obligated to agree to mediation.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Israel?

The Arbitration Act and Arbitration Procedures Regulations 5729-1968 (hereunder: "**The Arbitration Procedure Regulations**") promulgated according to the Act, govern the enforcement of arbitration agreements in Israel.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

The Arbitration Act and the Arbitration Procedure Regulations govern both domestic and international arbitration proceedings (i.e.

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in case one of the parties is foreign).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The Arbitration Act preceded the UNCITRAL Model Law, and thus, was not based on it. It should be noted, however, that the general principals in both legislations are similar, including the form of an arbitration agreement, procedures, conduct of arbitration hearings, court's intervention, granting of an award, confirmation and setting aside of an award. The Arbitration Act is less detailed than the model law. Under the Israeli Act, unlike the model law, in the absence of agreement on the number of arbitrators, the arbitration will be heard by a single arbitrator (as opposed to three in the model law) and the arbitrator(s) lack general power to grant interim relief (see the answer to question 7.1 below).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Israel?

Under Article 29A of the Arbitration Act, when an international convention or treaty that Israel is a party to applies, the confirmation or setting aside of an arbitral award will be carried out in accordance with the relevant convention/treaty.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Israel? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Under Article 3 of the Arbitration Act, an agreement referring to arbitration a matter that cannot be the subject of arbitration is invalid. Such matters include legal rights that cannot be waived or compromised (e.g., certain employees' rights); disputes involving criminal behaviour or resulting therefrom (e.g., the distribution of stolen goods between two thieves); and matters in which arbitration would be against the public interest (e.g., child custody and support).

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

If a matter is referred to arbitration and a party challenges the jurisdiction of the arbitrator over such matter, the arbitrator may rule on such challenge. The ruling of the arbitrator has value only within the framework of the proceedings before him (i.e., in order for him to decide whether to proceed with the arbitration) but it does not bind the court when the question of the arbitrator's jurisdiction is brought before it. The ultimate determination of the arbitrator's jurisdiction is in the hands of the competent court. The parties to an arbitration agreement may, however, grant the arbitrator the power to determine the scope of his jurisdiction.

A challenge in the court of the arbitrator's jurisdiction can be made at the outset of the arbitration proceedings, during the proceedings or after the arbitration award is made. If a party wishes to challenge the arbitrator's jurisdiction in court before an arbitral award is granted, such challenging party may request an injunction prohibiting the arbitrator from ruling on the matter that is outside his jurisdiction. If a party wishes to challenge in court the arbitrator's jurisdiction after the arbitral award is made, such challenge can be made in a motion to set aside the award pursuant to Article 24 of the Arbitration Act, or, alternatively, in a motion pursuant to Article 29B of the Arbitration Act (on the condition that the parties agreed that the arbitral award shall be appealable before a court). (See the answer to question 10.1 below.) A party is expected to raise his objection to the jurisdiction of the arbitrator within a reasonable time after becoming aware of it. A party who unreasonably delays his challenge to the arbitrator's jurisdiction may be barred.

3.3 What is the approach of the national courts in Israel towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court is authorised by the Arbitration Act (Article 5) to stay proceedings, provided that: (i) there is a valid arbitration agreement between the parties; (ii) the dispute is within the scope of the arbitration as agreed in the agreement; (iii) the defendant makes a good faith request, no later than the day on which he first pleads on the merit of the action (e.g., in his statement of defence), to stay the proceedings in the action; and (iv) the defendant who moved to stay has been and is still prepared to do everything needed to conduct the arbitration.

When the above-mentioned conditions are met, the court will usually stay the proceedings. However, the court has discretion not to enforce the arbitration agreement but rarely exercises such discretion. When deciding whether to exercise discretion to stay proceedings, the court will consider, *inter alia*, whether referring the matter to arbitration will cause injustice to a party, will unreasonably duplicate proceedings or split issues and create a real hardship (e.g., in extreme circumstances in which part of interconnected issues is subject to arbitration proceedings while the other part is outside the jurisdiction of the arbitrator) or will be contrary to public policy.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

There is no national tribunal in Israel.

3.5 Under what, if any, circumstances does the national law of Israel allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The arbitration agreement only applies to the parties and their successors and substitutes; it does not apply to third parties nor affect them. The arbitrator is authorised to summon witnesses (to testify or produce documents), though the enforcement of the order on a third party who refuses to appear and testify in the arbitration will require the intervention of the court (Articles 13(a) and 16(a)(2) of the Arbitration Act).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Israel and what is the typical length of such periods? Do the national courts of Israel consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

As a general rule, an arbitrator is not bound by the substantive law, evidentiary rules, or civil procedure rules of the courts. However, pursuant to the provisions of the Israeli Prescription Law, 5718-

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1958, the arbitrator is bound by the statute of limitations that applies to all civil claims in Israel. The Israeli statute of limitations for a civil claim not based upon a right in land is seven years. However, certain specific laws provide for shorter limitation periods. The statute of limitations for a civil claim founded upon a right in land varies depending upon the manner in which the land is registered with the Israeli Land Registry. If the land is considered "*Mekarkain Musdarim*" (land in which ownership and other rights are fully recorded in the official registry), then it is not subject to any statute of limitations. However, if an individual's claim is based upon a right to land that predates December 1969, the applicable statute of limitations period is 25 years. If the land is considered "*Mekarkain Lo Musdarim*" (land in which ownership and other rights are not fully recorded in the official registry) or if the land is not registered at all, the applicable statute of limitations period is 15 years.

In Israel, time limits imposed by the statute of limitations are treated as a procedural law issue, unless otherwise determined by a specific law.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Section 14 of the Standard Arbitration Rules provides that an arbitrator is not obligated to rule in accordance with the substantive law, unless the arbitration agreement between the parties provides otherwise. When the arbitration agreement provides that the arbitrator will rule in accordance with substantive law, the arbitrator is bound by the substantive law. In such case the arbitrator will normally apply Israeli substantive law. There are, however, exceptions to this rule: if the subject matter of an arbitration is a contract which is governed by a foreign substantive law, the arbitrator will be required to apply such substantive law to the contractual dispute. Likewise, if an arbitration involves foreign elements the arbitrator may apply a choice of law analysis and determine which substantive law should apply to the dispute.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Israeli courts will generally recognise the parties' choice of law. However, in certain circumstances, when the law of the jurisdiction chosen by the parties is contradictory to Israeli public policy, the courts will refuse to respect the parties' choice of law and will instead apply the law of the forum, i.e., Israeli law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The Israeli Arbitration Act contains provisions regarding the formation, validity, and legality of arbitration agreements; thus, all arbitration agreements brought before arbitrators in Israel must abide by such provisions. With respect to the formation of an arbitration agreement, Article 1 of the Arbitration Act provides that an arbitration agreement must be in writing (see the answer to question 1.1, *supra*). With regard to an arbitration agreement's validity and legality, Article 3 of the Arbitration Act provides that an arbitration agreement which refers to arbitration a matter that cannot be the subject of an agreement between the parties is void. (See the answer to question 1.1, *supra*.)

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Generally, there are no limits to the autonomy of the parties to select arbitrators. There are, however, rare exceptions to this rule in specific laws governing certain unique economic activities of public entities.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The parties may select the arbitrator in the arbitration agreement. The arbitration agreement may also empower a specific person to select the arbitrator (it is a common practice in Israel to empower the chairman of the Israeli Bar Association to select the arbitrator upon the request of a party) or set forth a method by which the arbitrator will be selected. If the method chosen by the parties to select the arbitrator fails, the court may appoint an arbitrator upon the request of a party to the arbitration agreement (Article 8 of the Arbitration Act), unless the court determines that the intention of the parties was that only the specific arbitrator nominated in the arbitration agreement will act as arbitrator. In addition, when the office of arbitrator becomes vacant (as a result of his death, resignation or removal), the court may appoint a substitute arbitrator, unless a contrary intention is inferred from the arbitration agreement (Article 12 of the Arbitration Act).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court may not, under normal circumstances, intervene in the selection of the arbitrator. The court may, however, intervene in the selection of the arbitrator if the court determines that: (i) the selected arbitrator is not worthy of the trust of the parties (e.g., if it is discovered after his selection that he had some hidden ties with a party to the arbitration); (ii) the conduct of the arbitrator in the arbitration causes grave injustice; or (iii) the arbitrator is unable to perform his/her duties (Article 11 of the Arbitration Act).

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Normally, the arbitrator is expected to be independent, neutral and impartial and the court may overturn his selection if it is discovered that he is not independent, neutral or impartial. The arbitrator must inform the parties of any circumstances of which he is aware that may cast a doubt on his independence, neutrality or impartiality. The parties may, however, select an arbitrator who is not fully independent, neutral or impartial, provided that they do so freely and intentionally with full knowledge of all the relevant facts. Once selected, the arbitrator has a duty of trust towards all the parties (Article 30 of the Arbitration Act).

5.5 Are there rules or guidelines for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Israel?

Article 30 of the Arbitration Act provides that an arbitrator who agrees to arbitrate a conflict has a duty of trust towards the parties. The Israeli courts held that the duty of trust includes the obligation of the arbitrator to disclose to the parties information which may

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place the arbitrator under a conflict of interests, as a result of relations that he may have with either parties to the arbitration or relating to the subject-matter of the arbitration.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Israel? If so, do those laws or rules apply to all arbitral proceedings sited in Israel?

The Arbitration Act and the Arbitration Procedure Regulations govern arbitrations sited in Israel as well as court proceedings in Israel relating to arbitration. The Arbitration Act leaves the parties to the arbitration with a broad autonomy in determining the rules and procedures of the arbitration between them.

6.2 In arbitration proceedings conducted in Israel, are there any particular procedural steps that are required by law?

The commencement and conduct of the arbitration do not require any formal or procedural steps. In order to enforce or set aside an arbitral award one must follow the procedures specified by the Arbitration Act and Arbitration Procedure Regulations (see the answer to question 10.1 below).

6.3 Are there any rules that govern the conduct of an arbitration hearing?

The Arbitration Act and the Standard Arbitration Rules set the basic rules that apply, unless otherwise agreed by the parties. The Standard Arbitration Rules (which, as mentioned before, can be changed by the parties) include the following rules: (i) the arbitration will be held before a single arbitrator; (ii) the arbitrator has wide discretion to issue orders to answer interrogatories and discover documents; (iii) if a party repeatedly fails to abide by an order of the arbitrator, the arbitrator has power to dismiss the case or issue an award in favour of the other party; (iv) the arbitrator will conduct the arbitration in a manner that appears to him most efficient and equitable; (v) the arbitrator is not bound by substantive law, rules of evidence or rules of procedure that apply in court; (vi) the arbitrator has power to grant any remedy that a court may grant; (vii) the arbitrator has the right to suspend the hearings or the award if his fees are not paid. Other provisions of the Standard Arbitration Rules are discussed in the answers to specific questions below.

6.4 What powers and duties does the national law of Israel impose upon arbitrators?

The arbitrator has many of the powers of a court. The arbitrator lacks the power to compel witnesses to appear before him/her or to penalise a witness who is in contempt of the arbitration proceedings. The arbitrator cannot enforce the arbitral award.

The primary duty of the arbitrator is a duty of trust towards the parties (Article 30 of the Arbitration Act). Many specific obligations and duties stem from the duty of trust. If the arbitrator breaches his duty of trust to the parties or acts negligently in the performance of his duties as arbitrator, he is liable towards the parties for the damage suffered by them as a result.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Israel and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Israel?

The Chamber of Advocates Law, 5721-1961 prohibits lawyers from other jurisdictions from practicing law in Israel unless such lawyers have completed the required period of apprenticeship and passed certain examinations administered by the Israel Bar. The law does not provide an exception from the rule in arbitration proceedings.

On August 24, 2008, the Israeli Government passed a resolution to support an amendment of the Chamber of Advocates Law that will permit a foreign lawyer, who has practiced law for at least two years in a foreign jurisdiction and who has passed the ethics part of the Israel Bar Examination in Hebrew or English, to represent a party in arbitration proceedings in Israel which is governed by or relates to the law of the lawyer's home jurisdiction. However, no bill for this amendment has been published yet.

6.6 To what extent are there laws or rules in Israel providing for arbitrator immunity?

Article 8 of the Torts Ordinance [New Version] 1968 provides that an arbitrator, similar to other individuals fulfilling judicial functions, shall be immune from lawsuits brought in connection with the fulfilment of his judicial profession. Thus, in principle, arbitrators are afforded broad immunity, which, as the courts have held, includes immunity for negligent actions. Nevertheless, the Supreme Court has held that in light of Article 30 of the Arbitration Act, which, as noted above, imposes a duty of loyalty on arbitrator, an arbitrator shall not be immune from a lawsuit brought on the grounds that the arbitrator breached his duty of trust or was motivated by an improper motive.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Principally, the courts are reluctant to interfere during the course of arbitration even when authorised to do so, and will interfere only in unusual circumstances. The Supreme Court repeatedly supported this practice in order to reinforce the arbitration process as an effective alternative dispute resolution mechanism.

The court may issue instructions to the arbitrator during the arbitration process if the arbitrator exceeds his authority or deviates from the procedures of the arbitration as agreed by the parties or imposed under the Standard Arbitration Rules, but the court will do so cautiously and sparingly. Under the Arbitration Act, the court has the power to assist in the arbitration proceedings as follows: (i) issuing subpoenas to witnesses to appear and testify in the arbitration and enforcing the compliance of witnesses with such subpoenas; (ii) obtaining the testimony of witnesses outside the Sate of Israel; and (iii) granting interim and preliminary orders, such as injunctions, attachment of assets, appointment of temporary receiver.

6.8 Are there any special considerations for conducting multiparty arbitrations in Israel (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

The arbitration law does not address this issue and there is no

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separate set of rules that applies to multiparty arbitration. Thus, multiparty arbitrations are conducted under the same rules as two-party arbitrations. A third party who is not a party to the arbitration agreement cannot intervene in the arbitration process without the consent of all the parties to the arbitration.

6.9 What is the approach of the national courts in Israel towards *ex parte* procedures in the context of international arbitration?

The rules governing *ex parte* procedures in arbitration are the same in local and international arbitrations. According to the Arbitration Act, the arbitrator may: (i) hold an arbitration hearing even if a party, who was properly summoned to the hearing, is absent; and (ii) make a decision (including an arbitral award) even in the absence of arguments of a party who failed to submit them by the time prescribed by the arbitrator (Article 15(a) of the Arbitration Act). Section 10 of the Standard Arbitration Rules provides that an arbitrator shall not hold a hearing in the absence of a party and shall not make a decision in the absence of argument of a party, unless the party was warned that the hearing will take place or the decision will be made even in his absence. Thus, when the Standard Arbitration Rules apply, the arbitrator may not act under Article 15(a) unless he warned the party in advance of the consequences of his absence or failure to submit his arguments.

The arbitrator may, at the request of a party made within 30 days from receipt of the award, annul the award and reopen the arbitration if the award was given in the absence of arguments on behalf of such party or after a hearing from which such party was absent, if the arbitrator is convinced that the failure to appear at the hearing or submit arguments was due to a justified reason (Article 15(b) of the Act).

The national courts as well as arbitrators are generally reluctant to proceed *ex parte* unless they are satisfied that the failure to appear or argue was deliberate. The courts will, however, uphold the decision of an arbitrator to proceed *ex parte* if they are satisfied that the arbitrator followed the pre-conditions for proceeding *ex parte*.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

The power of an arbitrator to grant preliminary or interim relief is not settled in the case law and academic literature. The Arbitration Act empowers the court to grant preliminary remedies in connection with arbitration proceedings but does not grant similar powers to the arbitrator. There is no precedent of the Supreme Court in this matter. In one *obiter dictum* a Supreme Court judge expressed the opinion that an arbitrator has no power to issue an order of attachment (CA 603/80 **Establishment Nahal vs. Holiday Inns Inc**, PD 35(3) 393). There are some conflicting district court decisions on this subject. Some decisions also raised the inherent difficulty in enforcing preliminary arbitration orders. The better view today is that an arbitrator is not authorised to issue preliminary or interim relief. If the parties expressly grant the arbitrator the power to order a preliminary relief and undertake to abide by such order it is possible that the court will issue an order that will enforce such relief.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Under Article 16(a) (5) to the Arbitration Act and Section 17 to the Schedule, a court is authorised to grant preliminary or interim relief in proceedings that are subject to arbitration. The discretion of the court is broad and not limited to specific circumstances. Filing with the court of a motion for the issuance of preliminary or interim relief does not have any effect on the jurisdiction of the arbitrator.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The approach of the courts to requests to issue a preliminary relief in connection with arbitration proceedings is the same as the approach of the court to preliminary relief in matters that are pending before the court.

7.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Section 18 of the Schedule permits the arbitrator to order a party to deposit a security for the costs and fees of the arbitrator or the other party. The court does not have authority to order a party to an arbitration to give a security for costs of the arbitration.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Israel?

Unless otherwise provided in the arbitration agreement, the Standard Arbitration Rules provide that the rules of evidence do not apply in arbitration proceedings (Section 14). In practice, the parties rarely deviate from the Standard Arbitration Rules and require the arbitrator to follow the rules of evidence.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

Disclosure of documents in arbitration can be obtained in two ways: (i) by ordering general or specific discovery of documents; or (ii) by ordering a witness to present documents in his testimony. The arbitrator has a broad discretion to order general and specific document discovery from the parties. The arbitrator has no authority to order document discovery or document production from a third party. In order to obtain a document from a third party the arbitrator may issue a request to the third party to appear as a witness in the arbitration and bring the desired document with him. If the witness is unwilling to appear or deliver the requested document, then the party requesting his appearance must apply to the court for the issuance of a subpoena to the witness. The subpoena may also be for specific documents. The court has discretion to refuse to issue a subpoena or limit the documents which the witness is ordered to bring.

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8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

The court has very little room for intervention in orders of the arbitrators regarding discovery and production of documents between the parties to the arbitration. The court has broader discretion when a party requests the court to issue a subpoena for a third party's documents.

8.4 What is the general practice for disclosure / discovery in international arbitration proceedings?

Disclosure and discovery matters can be the subject of agreement between the parties in the arbitration agreement or, in the absence of such agreement, the matter is governed by the Standard Arbitration Rules which grant the arbitrator considerable discretion to allow document discovery and its scope. The general practice in international arbitration proceedings in Israel is to allow discovery of all documents which are in possession or under the control of the parties and relevant to the issues in dispute. Relevant documents are both "helpful" documents and "damaging" documents, namely, those documents that may help proving the case of a party as well as those documents that may help to disprove it. "Relevancy" in the context of document discovery in Israel is narrowly construed in comparison to the US practice. Relevant documents are those documents that are directly relevant to the issues in dispute and not those that are only remotely relevant.

8.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

According to the Arbitration Act (Article 13(b)), witnesses in arbitration proceedings have the same rights and duties as witnesses in court. The parties can agree in the arbitration agreement on a variety of issues relating to witnesses and testimony. Unless otherwise agreed by the parties, the following rules will apply: (i) the arbitrator swears the witnesses in by admonishing them that they are liable to punishment for perjury if they do not tell the truth; (ii) arbitrators usually order that witnesses who are connected with the parties will submit, prior to testifying, their written testimony in chief in the form of a sworn affidavit and in such case the examination of the witness in the oral arbitration hearing will be devoted to the cross-examination of the witness by the other party; (iii) the standard practice is to allow extensive cross-examination of the witnesses and the arbitrator would normally grant significant leeway to the cross-examiner; and (iv) limited re-direct examination will be allowed with respect to matters that were left unclear in cross-examination.

8.6 Under what circumstances does the law of Israel treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Privileged documents (i.e., documents that a party to litigation or a witness cannot be required to disclose or present) fall into two categories: absolute privilege; and relative privilege. Documents that enjoy absolute privilege in court (e.g., communications between a client and his attorney) enjoy the same privilege in arbitration (Article 52 of the Evidence ordinance [New Version] 1971). In respect of documents that enjoy relative privilege (e.g., communications between a patient and his physician) the arbitrator has discretion to order their disclosure and will usually utilise the same tests and criteria that a court would use under similar circumstances.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

The arbitral award must be in writing, signed and dated by the arbitrator. In case of multiple arbitrators, a signature of the majority of them is sufficient if the award states that the rest of the arbitrators could not or would not sign the award (Article 20 to the Arbitration Act). Unless otherwise agreed upon by the parties, the award must provide the reasons for the decision of the arbitrator. If the parties agreed in their arbitration agreement that the arbitral award shall be appealable either before another arbitrator or before a court, then the arbitration agreement may not exempt the arbitrator from the obligation to provide the reasons for his decision.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Unless the parties specifically agree that the arbitration award will be subject to an appeal on the merits (see detailed discussion below), an arbitral award cannot be appealed on its merits. In such case, the sole recourse of a party dissatisfied with an arbitral award was to request that the court set aside, supplement, amend, or remand the award based on very narrow grounds which demanded a court finding that: (i) there was no valid arbitration agreement; (ii) the arbitrator was not legally appointed; (iii) the arbitrator acted without authority or exceeded the authority vested upon him by the arbitration agreement; (iv) a party was not given a proper opportunity to present his arguments and evidence; (v) the arbitrator failed to rule on any of the matters which were referred to him; (vi) the arbitrator did not give the reasons for his award although the arbitration agreement required him to do so; (vii) the arbitrator did not apply substantive law although the arbitration agreement required him to do so; (viii) the award was issued after the time fixed for its issuance had expired; (ix) the content of the award was contrary to public policy; or (x) there exist circumstances under which a court would have set aside a final and non-appealable judgment (e.g., if it is proven that the arbitral award was obtained by fraud) (Article 24 of the Arbitration Act).

Until recently there was no possibility of appealing the merits of an arbitration award (except by an elaborate and complicated voluntary arrangement which was not explicitly recognised by the Arbitration Act). Since the court had no power to interfere with the substance or results of an arbitral award (except for the narrow grounds mentioned above) - even if it is evident that the arbitrator made a mistake on the merits - it was argued that parties to many disputes were reluctant to refer them to arbitration. In order to address the above concern, the Israeli Parliament enacted in November, 2008, a major amendment to the Arbitration Act. This amendment ("**Amendment No. 2**") permits the parties to agree to an appeal on the merits of an arbitral award either in court or by an appellate tribunal of arbitrator(s). Absent such agreement, the award is not appealable on the merits.

Appeal Before an Arbitrator - Article 21A(c)(1) of the Arbitration Act provides that the parties may agree that the arbitral award will

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be subject to appeal before one or more arbitrators. In such case the parties may apply to the court to set aside the arbitral award only on the following grounds: (i) the content of the award violates public policy; or (ii) grounds exist which would result in the court's setting aside a final non-appealable court decision.

Appeal Before the Court - The Arbitration Act provides in Article 29B(a) that the parties may agree that the arbitral award may be appealed on the merits in court if the courts grants leave to appeal. The court may grant leave to appeal in the event that the arbitrator made a fundamental error in applying the law and such error resulted in a miscarriage of justice.

The above two channels of appeal are mutually exclusive. If the parties agreed that the arbitral award shall be appealable before an arbitrator, they are precluded from appealing the arbitration award in court.

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

As explained above, the parties' consent is required to create a right to appeal an arbitration award on the merits, either before an appellate arbitration tribunal or before a court. Without such consent, an appeal on the merits does not exist under Israeli law. The parties cannot agree to exclude judicial review of an arbitral award under Article 24 of the Act.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

As a general rule, the parties may not agree to expand the scope of an appeal of an arbitral award in court beyond the grounds set forth in the Arbitration Act. The parties have contractual freedom to expand the scope of an appeal before an appellate arbitral tribunal.

10.4 What is the procedure for appealing an arbitral award in Israel?

According to the provisions of the Arbitration Act, the procedure for appealing an arbitral award varies depending on the tribunal before whom the award is appealed.

When the arbitral award is appealed *before an arbitrator*, the Second Schedule to the Arbitration Act (which is a dispositive set of rules - which the parties are at liberty to change) provides that the appeal shall be submitted within thirty days from the date the award was served on the parties or from the date the arbitrator for the appeal was appointed, whichever is later. The Arbitration Act further requires that the appellant state the reasons that set the basis for the appeal. The other parties may provide a detailed response to the appeal within thirty days from the date the appeal was served upon them. The appellant may answer to such response within fifteen days from when the response was served upon him. The Second Schedule further provides that once an appeal has been submitted, the other parties may submit a counter appeal within thirty days from the date the appeal was served upon them and the other parties may submit a detailed response to the counter appeal within fifteen days from when the counter appeal was served upon them. The rules governing the proceedings of arbitration will apply to an appeal before arbitrator, *mutatis mutandiss*. Pursuant to the provisions of the Second Schedule, the presiding arbitrator in the appeal may hear oral arguments and request written closing arguments, but may not hear witness testimony. The arbitrator's decision in the appeal shall be based upon the evidence that was before the first arbitrator, as well as the pleadings submitted during the appeal.

When the arbitral award is appealable *before a court*, Article 29B(b) of the Arbitration Act provides that when the parties agreed that the arbitral award shall be subject to appeal before a court, the arbitrator must reasoned his decision. In addition, Article 29B(a) provides that the law applying to appeals before a court pursuant to Article 29B(a) shall be the same law that applies to all civil appeals in Israel. Israeli courts strictly enforce the rules regarding the deadlines for submitting appeals or motions to grant leave to appeal. Pursuant to Regulation 399 of the Civil Law Procedure Regulations, 5744-1984 (the "**Procedure Regulations**"), the deadline for filing a leave to appeal is 30 days from the date the arbitration award was granted. Regulation 403(a) of the Procedure Regulations provides that a motion to grant leave to appeal shall be submitted in writing and shall briefly detail the applicant's oppositions to the judgment rendered. The Procedure Regulations further provide that an appellant or a party submitting a motion to grant leave to appeal must provide security to cover the costs of the defendant in the event that the appeal will be denied.

11 Enforcement of an Award

11.1 Has Israel signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Israel is a party to the New York Convention of 1958. Israel ratified the Convention on June 7, 1959 without reservations. The convention was incorporated into Israeli law through Article 6 of the Arbitration Act and the Regulations for the Execution of the New York Convention 5738-1978.

11.2 Has Israel signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Israel has not signed any regional conventions concerning the recognition or enforcement of arbitral awards.

11.3 What is the approach of the national courts in Israel towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The general approach of the Israeli judiciary is supportive of the institution of arbitration and the referral of disputes to ADR. In furtherance of this approach Israeli courts are reluctant to interfere with or overturn arbitral awards.

A party wishing to enforce an arbitral award must obtain a court confirmation of the award. Such confirmation can be requested from the court by a simple motion. Once the arbitral award is confirmed the award has the force of a court judgment. A party wishing to challenge an arbitral award may request that the award be set aside on the grounds set forth in Article 24 of the Arbitration Act, or may alternatively appeal the arbitral award before an arbitrator or before a court if leave to appeal is granted, provided the parties' arbitration agreement stated that the arbitral award is subject to appeal. The Arbitration Act (Article 28) provides that if a party submitted a request to set aside the arbitral award or appealed on the arbitral award, and was denied, the court will automatically confirm the arbitral award, even if no request for confirmation is made.

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11.4 What is the effect of an arbitration award in terms of *res judicata* in Israel? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

According to Article 21 of the Arbitration Act, the arbitral award binds the parties, their successors and substitutes as *res judicata*, and may not be re-argued in future litigation, unless a contrary intention appears from the arbitration agreement.

12 Confidentiality

12.1 Are arbitral proceedings sited in Israel confidential? What, if any, law governs confidentiality?

There is no statutory provision or case law in Israel that prohibits a party to arbitration proceedings from disclosing the contents of the proceedings or any document submitted in such proceedings. It is generally accepted that the arbitrator must, as part of his duty of trust to the parties, maintain the arbitration proceedings and the arbitration file in confidence and may not disclose it without the consent of all parties to the arbitration. It has been suggested by a leading Israeli authority on arbitration law that each party to the arbitration proceedings has a similar duty based on certain general laws pertaining to privacy.

The parties are free to agree in the arbitration agreement that the contents of the arbitration and any document submitted in the arbitration will be treated as confidential. A breach of such undertaking will be treated as a breach of contract with the remedies available for breach contract (injunction, damages etc.).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Israeli law does not provide a conclusive answer to the question of whether information disclosed in arbitral proceedings may be referred to and/or relied on in subsequent proceedings. There is judicial precedent which indicates that information disclosed in arbitral proceedings may be referred to and/or relied on in subsequent proceedings. However, where a trade secret is involved, the courts may grant a protective order forbidding the disclosure of such trade secret. Where the parties agree that the contents of the arbitration and any documents submitted in the arbitration shall remain confidential, the parties will be estopped from referring to or relying on information disclosed in the arbitral proceedings in subsequent proceedings.

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Israeli law contains no statutory provision which provides that arbitral proceedings shall remain confidential. Therefore, in the event that the parties did not agree that the proceedings shall remain confidential, it is possible that a court may allow the disclosure of any information or documents disclosed in the arbitral proceedings if the interest of a third party requires such disclosure.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Unless another intention appears from the agreement, the arbitrator may grant a broad variety of remedies similar to those available to the court, such as injunctions, enforcement orders, declaratory judgments and monetary judgments. Punitive damages are rarely granted in Israel. If the arbitrator is bound by substantive law he may order punitive damages only if the substantive law recognises it. When the arbitrator is not bound by substantive law he may, in principle, order punitive damages. It is very uncommon in Israel, however, to order punitive damages.

13.2 What, if any, interest is available, and how is the rate of interest determined?

It is customary in Israel to add interest and inflationary adjustment (based on the index of cost of living in Israel published monthly by the Israeli Central Bureau of Statistics) to monetary arbitral awards. The interest and inflationary adjustments are usually calculated from the date on which the monetary obligation first became due or on which the damage occurred until the date of actual satisfaction of the award by the losing party. The rate of interest may not exceed the maximum rate of interest set in the Determination of Interest and Linkage Act 5721-1961.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

According to the Standard Arbitration Rules (Section 18), the arbitrator is authorised to award and allocate fees and costs, including attorneys' fees and arbitrator's fees and other costs related to the arbitration (such as copying, stenography, travel, experts' fees). The common practice is that prior to the arbitral award, each party bears his own costs and fees while the interim payments to the arbitrator are equally shared by all parties. In the arbitral award, the arbitrator usually awards legal fees to the successful party and requires the losing party to reimburse the successful party for costs incurred by him (including interim payments to the arbitrator). The fees that are usually awarded are lower than the actual fees paid by the successful party to its attorneys. The arbitrator may award to a plaintiff lower fees or no fees at all if the arbitral award accepts only part of the claim. The award of fees and costs may also depend on the conduct of the parties in the arbitration.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award is taxable in accordance with the relevant tax regime to which the parties and the subject-matter of the arbitration are subject (e.g., if an arbitral award grants to an employee payment for certain benefits, the award will be taxed in accordance with the tax law that applies to such employee's benefits). Otherwise, there is no tax payable on arbitral awards as such.

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14 Investor State Arbitrations

14.1 Has Israel signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Israel signed the convention in question on June 6, 1980 and ratified it on July 22, 1983.

14.2 Is Israel party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Israel is a party to 13 BITs, however only 11 provide for ADR under the auspices of the ICSID. Countries which have entered into BITs that include such an ADR provision are: Bulgaria, Estonia, Ethiopia, Hungary, Slovakia, Czech Republic, France, Republic of Korea, Romania, Thailand, and Turkey.

14.3 Does Israel have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

We are not aware of any formal standard terms or model language.

14.4 In practice, have disputes involving Israel been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Israel been to the enforcement of ICSID awards and how has the government of Israel responded to any adverse awards?

We are not aware of any disputes resolved by the ICSID.

14.5 What is the approach of the national courts in Israel towards the defence of state immunity regarding jurisdiction and execution?

The State of Israel does not enjoy, with minor exceptions, immunity in arbitration proceedings. The immunity of a foreign country in the Israeli courts is not absolute but rather limited and relative. The immunity will only apply in matters of public law when the foreign country carries out sovereign acts, and will not apply in the area of private law (e.g., when a foreign state rented a house for its ambassador, the court allowed the landlord to sue the foreign country in court). Any matter involving a foreign state that can proceed in court can be the subject of arbitration proceedings.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Israel? Are certain disputes commonly being referred to arbitration?

There is a considerable backlog in the Israeli courts and civil cases may take up to 5 years to reach judgment in the first instance. Arbitration is a common, useful and efficient means to resolve commercial disputes in Israel. It is especially useful when the issues at stake are complex or require special expertise. There are substantial benefits to referring commercial disputes to arbitration in Israel: (i) the parties can select a business-oriented arbitrator; (ii) the dispute can be resolved much faster than in court; (iii) the process is more "friendly" in terms of scheduling hearings and time tables; (iv) the pleadings and hearings may be kept confidential and are not open to the public; and (v) the limited legal grounds to challenge the award minimise the risk of "ever-lasting" disputes.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Israel, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

The laws governing arbitration in Israel underwent a revolutionary change in November 2008 with the enactment of Amendment No. 2 to the Arbitration Act. Whereas in the past there was no possibility to appeal an arbitral award on its merits, the newly amended Arbitration Act allows the parties to agree that the arbitral award will be subject to appeal on its merits before another arbitrator, or, alternatively, before a court. In case of such agreement Amendment No. 2 also imposes on the arbitrators an obligation to provide written reasons for their rulings. Such reforms to the Arbitration Act alleviates the concerns of parties to disputes - who were reluctant to refer their disputes to arbitration in fear of unappealable arbitration awards - and makes arbitration a far more attractive mean of extra-judicial dispute resolution in Israel. It is early, however, to evaluate the overall impact of the new appeal mechanism on the future development of arbitration law in Israel. As with any new enactment, its application may face in the coming years ambiguity on a variety issues of procedure.

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