The International Comparative Legal Guide to:

International Arbitration 2005

A practical insight to cross-border International Arbitration work

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1 Arbitration Agreements

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

Israel’s arbitration law is governed mainly by the Arbitration Law – 1968 (hereinafter, the “Arbitration Law” or the “Law”). The Arbitration Law only applies to written arbitration agreements (Section 1 of the Law). An oral arbitration agreement, which has been the subject of an arbitral award, is indeed valid, and a party to the agreement may base an action upon the obligations arising from such an award (Section 39 of the Law). However, the various means of action provided by the Law, such as stay of proceedings or confirmation of an arbitral award, will not be available to the parties of an oral arbitration agreement. Such parties will only be able to realise their rights under the arbitral award by bringing an action before the court based on the award. C.A. 661/88 Haimov v. Hamid PD 44(1) 75. Pursuant to Section 3 of the Arbitration Law, an arbitration agreement will only be valid if the subject of the agreement constitutes valid subject matter for a contract between the parties. (See the answer to Question 3.1 below).

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

The Arbitration Law does not require other elements to be incorporated into an arbitration agreement, provided that the arbitration agreement reflects the desire of the parties involved to resolve existing or potential disputes by way of arbitration. The agreement need not be detailed. Thus, for example, an arbitration agreement does not need to specify the name or method of appointment of the arbitrator. (Under Section 8 of the Arbitration Law, in the event that an arbitrator was not appointed by the parties to the agreement, the court may appoint an arbitrator at the request of a party). It is also not required that an arbitration agreement include any matter of procedure, as in the absence of such instructions, such matters will be implemented pursuant to the Law. For example, Section 2 of the Law provides that unless the agreement suggests otherwise, every arbitration agreement shall be interpreted to include the relevant provisions of the Schedule to the Arbitration Law (hereinafter, the “Schedule”). The Schedule is comprised of twenty provisions regarding a variety aspects of arbitration, including the following: the number of arbitrators, the place of arbitration, management of the arbitration, disclosure and discovery procedures, testimony procedures, the use of experts, the method of receiving the arbitral award, the date of issuance of the arbitral award, the content of the arbitral award, the procedure for consultation with the court, legal fees and expenses of the parties, etc.

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

The Israeli courts tend to uphold and enforce arbitration agreements. The Arbitration Law provides the courts with the tools necessary for the enforcement of arbitration agreements in cases in which disputes, which the relevant parties had agreed to refer to arbitration, are instead brought before the court. In such situations, pursuant to Section 5 of the Arbitration Law, the court, at the request of one of the parties, will stay the legal proceedings surrounding the action at hand, provided that the requesting party has been and is prepared to do everything required for the institution and continuation of the arbitration. If the court finds “special reason” why the dispute should not be resolved in arbitration, the court, may refrain from postponing the proceedings. In addition, in a situation in which a dispute arises regarding a matter, which was agreed to be brought before arbitration, and a specific arbitrator was not identified in the agreement, the court may, at the request of a party, enforce the agreement by appointing an arbitrator (Section 8 of the Law).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in your country?

The Arbitration Law, which governs the legal field of arbitration, was legislated by the legislative authority of Israel, the Knésset, and thus has the status of primary legislation. As an arbitration agreement is merely a specific form of a contract, in the event that the Arbitration Law does not adequately address a matter of arbitration, the general provisions of Israeli contracts law shall apply.

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

Israeli legislation does not refer to international arbitration procedures. It would seem, however, that in the absence
of such provisions, international arbitration procedures would be governed, first, by the consent of the relevant parties and, second, in the absence of such consent, by the rules of private international law, which may refer to the domestic arbitration law of one of the parties to the agreement.

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?

Israeli legislation is not based on the UNCITRAL Model Law, nor does it adopt any of its provisions. In fact, Israeli law does not refer to the UNCITRAL Model Law in any way.

3 Jurisdiction

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

 Parties to an agreement may agree that any dispute, which will arise between them, shall be resolved through arbitration. Nevertheless, freedom of contracts is not unlimited in Israel. Under Section 30 of the Law of Contracts (General Part) – 1973, in the event that the formation, content or objective of a contract is illegal, immoral or in conflict with public policy, such contract is null and void (although there do exist some exceptions under which such a contact will be deemed partially valid). This general provision applies, inter alia, to arbitration agreements. In addition, Section 3 of the Arbitration Law imposes a specific restriction upon arbitration agreements, under which any arbitration agreement regarding a matter, which may not be the subject matter of a contract between the parties, is null and void. Thus, for example, any matter of personal status, which determines the juridical status of a person as married, divorced, an heir, etc., shall not be determined through arbitration. Similarly, the act of effecting a liquidation of a company, which has implications upon third, uninvolved, parties, is not within the authority of an arbitrator. In addition, pursuant to the case law which has addressed this matter, rights protected under the law, such as protected tenancy and employee rights, shall not be determined in arbitration, nor shall any matter, which, pursuant to the law, is to be determined in the discretion of an office holder or administrative authority, be brought to arbitration. A. Strussman, The Book of Arbitration, 2001, at 39-63, [hereinafter Strussman].

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

The jurisdiction of an arbitrator is derived from the relevant arbitration agreement. In the event that a dispute arises with respect to the jurisdiction of an arbitrator to rule upon a specific matter, the arbitrator will generally have the authority to rule upon the matter unless expressly determined otherwise in the agreement. Any party who objects to an arbitrator’s interpretation of the scope of his or her own authority, may do one of the following: approach the court and request declarative relief stating the arbitrator’s lack of authority, request that the arbitrator appeal to the court in a “case stated” (see answer to Question 5.1 below), regarding the scope of his or her authority or request that the court set aside the arbitral award. Prof. S. Ottolenghi, Arbitration – Law and Procedure, 3rd Ed. (expanded), 1991, at 439, [hereinafter Ottolenghi]. The jurisdiction of the arbitrator may also be questioned in a case in which the validity of the arbitration agreement itself is in dispute. In such case, the arbitrator will only have the authority to rule on the question of his or her own authority under the agreement in the event that the agreement authorizes the arbitrator to rule with respect to the validity of the agreement itself. Only in the event that the arbitrator rules that the contract is binding upon the parties, may he or she resolve the substantive conflict, in accordance with the arbitration provision included in the contract. Where the arbitration agreement does not authorize the arbitrator to rule with respect to the validity of the contract itself, the matter should be brought before the court, and arbitration should be postponed until the matter is settled by the court. Strussman, at 62; Ottolenghi, at 436-437; A.App. 130/71 Mashiach v. Raviah et. al. PD 25/2), at 572.

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties’ autonomy to select arbitrators?

The Arbitration Law does not limit the parties’ autonomy to select an arbitrator. The Law does not impose any requirements with respect to the identity of the arbitrator, and an arbitrator’s appointment is not stipulated upon any particular training or experience. The parties may agree to elect any arbitrator or to any mechanism for the appointment thereof; however, in the absence of such election, the court shall appoint an arbitrator (Section 8 of the Arbitration Law).

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

If the parties’ chosen method for selecting the arbitrators fails, the court may appoint an arbitrator upon the application of a party to the arbitration agreement (Section 8 of the Arbitration Law). If the parties wish that only a particular arbitrator will act as an arbitrator before them, whereas in his or her absence they would prefer that the matter be left unresolved or that it be resolved by
the courts, they must express their preference in the arbitration agreement, otherwise, the court shall assume that the parties did not intend to appoint only a particular arbitrator, and will appoint an arbitrator.

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

The court may intervene in the selection of arbitrators and remove an arbitrator from his or her position where: (i) it is discovered that the arbitrator is unworthy of the confidence of the parties, (ii) the arbitrator’s conduct in the course of arbitration causes a delay of justice, or (iii) where the arbitrator is unable to perform his or her arbitral duties (Section 11 of the Arbitration Law). Where the position of arbitrator has fallen vacant due to resignation, death or removal from his duties, the court will appoint a substitute arbitrator, unless the arbitration agreement suggests otherwise (Section 12(a)). In the event that the arbitrator has been removed from his or her position, the court may, alternately, decide that the dispute should not be resolved in arbitration if it finds “special reason” for so doing (Section 12(b) of the Law).

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

Under Israeli law, the arbitrator is required to be honest, disinterested and impartial, and he and his family members are required to be free of any personal or financial interest in the dispute between the parties or its outcome. C.A. 107/84, A.App. 254/86 Ilit Inc. et. al. v. Elco PD 42(1), 298 (hereinafter, Ilit; Strussman, at 109). Thus, for example, the court has ruled that a person who is employed by one of the parties may not serve as an arbitrator in the arbitration of such parties. Removing arbitrators based on their relationships to one of the relevant parties has not been limited to business relationships or friendships in Israeli law, but applies to any case in which the arbitrator has any substantial interest in the welfare of one of the parties. An arbitrator who finds himself in a conflict of interest must refrain from accepting the position of arbitrator, refrain from arbitrating, or resign from his position. If the arbitrator does not do so, he will be removed by the court upon suitable application of any of the parties (Section 11(1) of the Arbitration Law). It is important to note, however, that an arbitrator’s personal relationship with one of the parties and/or, prior acquaintance with the subject-matter of the arbitration and even his personal interest in the arbitration do not prevent him from being appointed as arbitrator, provided that such circumstances were known to the parties, and they agreed to his appointment. In such case, it is preferable that at the outset of the arbitration, before his appointment, the arbitrator set such personal interest in writing. Strussman, at 111. It should be noted that Israeli courts are reluctant to remove arbitrators from their position based on mere suspicions, whether sincere or illusory, of parties, however, they do not hesitate in doing so where there exists a real possibility of partiality or conflict of interest. Strussman at 112-114. Where a party was unaware of the arbitrator’s interest in or connection to the matter of arbitration, and only becomes so aware after the culmination of the arbitration proceedings, such will constitute a valid cause of action for setting aside the arbitral award, under Section 24(10). Ilit, at 298. In addition, under Section 30 of the Law, an arbitrator must act loyally towards the parties, and where an arbitrator betrays this confidence, as in a case where he conceals his interests in or connection to the relevant arbitration, the betrayed party is entitled to compensation payable in case of breach of contract, in addition to any remedies available under the Arbitration Law.

5  Procedural Rules

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

The Arbitration Law does not specify procedural rules for arbitral hearings. The parties may specify rules of procedure in the arbitration agreement or in any other written or oral agreement. Such procedural agreement, which specifies procedural rules for arbitral hearings and/or a time-schedule for such proceedings, will obligate the arbitrator and he or she must act in accordance with them. In the absence of such specification, the arbitrator has the authority to determine procedural matters. Strussman, at 143. In accordance with Section N of the Schedule, in such case, the arbitrator will act in the most productive manner so as to reach a just and rapid resolution of the dispute (which, as stated, applies where the parties have not agreed otherwise): he or she is not bound by the substantive law, rules of evidence or rules of procedure which are binding in court. In addition, the arbitrator may take any action with respect to the conduct of the arbitration, which a court is competent to take in any action brought before it (Section H of the Schedule). Unless agreed upon otherwise by the parties, any arbitration conducted in the state of Israel shall be conducted in accordance with the provisions of the Arbitration Law and the Schedule.

5.2 In arbitration proceedings conducted in your country, are there any particular procedural steps that are required by law?

The Arbitration Law does not require that any particular procedural steps be taken during the conduct of arbitration proceedings. The parties may, however, in their discretion, agree upon rules of procedure, presentation of arguments, discovery, etc.

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

The Arbitration Law does not specify procedural rules for arbitral hearings. The parties may determine rules of procedure in the arbitration agreement or in any other written or oral agreement. Unless otherwise determined by the parties, the arbitrator is not bound by the rules of procedure or evidence that are binding in court. The arbitrator may decide the manner in which arbitration will be conducted, and give any order that a court is competent to give in any action brought before it (Section H of the Schedule). Notwithstanding, relevant case law and literature have referred to the “rules of natural justice” as basic principles that should guide arbitration proceedings. Thus, for example, pursuant to such principles, the arbitrator is obligated to hold hearings in the presence of all of the parties, allow each party to voice its
claims, and refrain from meeting with one party without the knowledge or prior consent of the other parties. Note, however, that under Section 15(a) of the Arbitration Law, in the event that a party has been duly summoned to a hearing, and such party (or counsel thereto) does not appear, the arbitrator may carry on the hearing, where: (i) the arbitrator warned such party, in writing or orally, that the hearing will proceed in that party’s absence if such party does not attend (Section J of the Schedule); or (ii) the arbitration agreement explicitly or implicitly removes the warning requirement set forth in Section J of the schedule. The absent party may (i) request, within 30 days of its issuance, that the arbitrator set aside such award by claiming that his or her absence was justified (Section 15(b)), or (ii) submit, within 45 days of the resolution of the award, an application to the court, requesting that it set aside the arbitral award based on Section 24(4) of the Law (see the answer to Question 9.1 below).

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

Section 16 of the Arbitration Law sets forth the following ancillary authorities, granted to the court so that it may grant relief with respect to issues arising during arbitration, as if such issues had arisen in an action brought before the court:

- Summoning witnesses; determining their remuneration and expenses;
- Adoption of coercive and punitive measures, to be imposed upon witnesses who do not respond the summons of an arbitrator, or of a court, or who refuse to testify;
- Taking testimony forthwith, or out of jurisdiction;
- Substituted service of notices or documents on the litigants; and
- Granting interim relief, including granting attachments of property, stays of exit from the Israel, guarantees for the submissions of property, appointing receivers, and issuing mandatory prohibitory injunctions.

An application for relief may be submitted to the court by a party or by the arbitrator. If an arbitrator has yet to be appointed, a party may submit an application after duly notifying (in writing) the other litigants (Section 16(b)).

In addition, the court may be involved in arbitration by way of case stated. Under Section P of the Schedule, the arbitrator may bring either a legal question, which arises during the course of the arbitration, or the arbitral award, before a court of law, by way of case stated, to procure the opinion of the court. Such authority is only granted to the arbitrator, who may so act unless the parties have agreed otherwise in the arbitration agreement. The parties, however, may not force the arbitrator to submit such a case stated to the court, nor may the court compel the arbitrator to do so.

6 Preliminary Relief and Interim Measures

6.1 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?

Whereas the authority of the court to grant interim relief is well enshrined in Section 16 of the Arbitration Law, under which a litigant or arbitrator may approach the court, requesting any of the interim measures listed in Answer to Question 5.4, the authority of the arbitrator to grant such relief is not granted in the Arbitration Law. Section Q of the Schedule authorizes the arbitrator to grant "a declaratory decision, a mandatory or prohibitory injunction, an order for specific performance and any other relief which the court has the authority to grant...". The authority of the arbitrator to grant interim measures, however, is not mentioned in the Law or in the Schedule. In the legal literature, there exists an opinion which claims that the absence of explicit authorization of the arbitrator to grant such interim measures in the Law begs the conclusion that the only body which may grant such relief is the court, and that the authority granted in Section Q of the Schedule refers exclusively to final remedies. Ottolenghi, at 309-311. In C.A. 603/80 Nahal Establishment v. Holiday Inn. Inc. PD 35(3) 393, the Supreme Court addressed the question of whether an arbitrator has the authority to grant a provisional attachment. The Court noted, in dictum, that the answer to the above question is unclear, although it would seem that the authority to impose such an attachment belonged exclusively to the courts. Based on the Supreme Court’s side note, a District Court ruled that an arbitrator does not have the authority to grant interim relief, since such authority is especially sensitive and exercising such authority requires the ability to make decisions at early stages, based only on preliminary materials. Thus, under such circumstances, it is presumed that the legislator intended to restrict the powers and authority of the arbitrator in this regard. See also O.S. (T.A.) 1091/93 Shelford v. Blau DM 329, at 1-3. It is therefore preferable that parties who wish to avoid a dispute with respect to the authority of the arbitrator to grant interim relief should express their consent to grant the arbitrator such authority in the arbitration agreement. Ottolenghi, at 317. This consent will allow the arbitrator the authority to grant such interim relief, although, its practical enforcement will continue to be subject to the approval of the court. Strussman, at 199-202; Ottolenghi, at 316. Similarly, an interim relief that became final through an arbitral award requires the approval of the court in order to become enforceable by the Execution Office or via the legal proceedings available under the Contempt of Court Ordinance.

6.2 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?

A litigant or arbitrator may approach the court, requesting the interim measures listed above in Answer to Question 5.4. The application may be submitted at any stage of the arbitration, even if an arbitrator has yet to be appointed (Section 16(b) of the Arbitration Law). Submission of such
application does not stay the arbitration proceedings, unless the court or the arbitrator so directs (Section 18). The court’s authority to grant interim relief does not derogate from the powers of the arbitrator under the arbitration agreement or the Arbitration Law (Section 16(d)). Interim relief granted by the court under Section 16(a)(3), shall be upheld only until such time as the arbitral award is issued, unless otherwise cancelled by the court. The arbitrator may, however, determine that the interim relief be made final. In such case the arbitral award will have the status of a judgment of the court, except as regards to appeal (Section 17). In the event that the arbitrator does not direct that the interim relief be made final, the interim relief shall expire, and the relief granted pursuant to it will be cancelled.

Section 29 of the Arbitration Law grants the court the authority to grant interim relief to the party in whose favour the award was issued so that the award may be fully realized. Where an application to confirm or set aside an award has been submitted to the court, the court may order the attachment of the property of the party against whom the award was issued, stay of exit from Israel against such party or the submission of a guarantee for the implementation of the award.

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

When an application for interim relief has been submitted by a party to an arbitration agreement, as in standard legal proceedings, the court reviews whether the conditions required for awarding interim relief have been fulfilled, due to the fact that the legal process is only at its beginning, and the court has not yet had the opportunity to review the evidence or arguments of the relevant parties, nor has the substantive rights of the parties been determined. Thus, the court must consider the urgency of the request, whether the final outcome of the arbitral award will be frustrated in the event that relief is not granted, and whether it is probable that the applicant will succeed in proving his or her cause of action, otherwise, there will be no justification for awarding such interim relief. Even where the request is found to be urgent and the right to such relief proven apparently, the court must balance out the interests of the litigants. The court will weigh the benefit that will arise from the requested relief, if awarded, against the damage that will be caused to the respondent as a result of such grant. The possibility that granting the requested relief will cause unjustifiable injury may lead the court to require the applicant to deposit an appropriate security for the compensation of the respondent, in the event that it becomes apparent that the applicant’s request for interim relief was not justified. Strussman, at 202-203.

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in your country?

Section N of the Schedule provides that the arbitrator is not bound by the rules of evidence, which apply in court. The arbitrator acts in the manner which he or she views to be the most productive in the attempt to reach a just and rapid resolution of the dispute, (unless otherwise agreed upon by the relevant parties). Thus, evidence may be presented to an arbitrator in any manner he or she sees fit (except in cases in which the arbitrator must, based on the mutual consent of the parties, conduct arbitration pursuant to standard evidentiary rules that are binding in court). Strussman, at 177.

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

Section H of the Schedule grants the arbitrator the authority to direct the parties to answer interrogatories, to disclose and produce documents and to take any other action related to the conduct of the arbitration as would a court that has such authority in actions brought before it. An arbitrator may direct third parties, who are not involved in the arbitration, to disclose documents, pursuant to the arbitrator’s authority to summon witnesses to testify or produce documents under Section 13 of the Arbitration Law.

In Israel, the practice is that questionnaires and disclosure orders are answered in affidavits. The responses must be full and must relate to all of the documents relevant to the matter at hand which are in the possession, or under the control of the disclosing party, and which have been discovered by such party following proper investigation. A party, who claims that certain information or documents are privileged, must so claim in his response to the questionnaire or disclosure affidavit, and the arbitrator will determine whether such claim is justified. Litigants, who do not fulfil the arbitrator’s disclosure order, may be punished to the extent that they may lose their case or defense. Thus, under Section I of the Schedule, where the arbitrator issues an order related to the conduct of arbitration, and a party, without justifiable cause, fails to comply with the order, the arbitrator may, after warning the relevant party, dismiss the claim, in the event that such order was issued against the plaintiff or strike out the defense and rule as if the defendant had not presented a defense, in the event that such order was issued against the defendant. Strussman 157-161.

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

The list of ancillary powers granted to the court so that it may offer relief in arbitration proceedings does not include any authority with respect to questionnaires or document disclosure. Therefore, in general, the court does not intervene in these matters. Notwithstanding, where the arbitrator does not take care that the disclosure order is complied with and where the relevant party does not list all of the documents which relate to the matter at hand or does not allow the applicant to review such documents, the court may, when asked to set aside the arbitral award, find this to be sufficient cause to set aside, supplement, amend or remit the award to the arbitrator, based on the finding that the litigant was not allowed sufficient opportunity to state his claims or produce his evidence (Section 24(4) of the Law). Strussman 159-160.
7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

Neither Israeli legislation nor Israeli case law provides any specific rules for disclosure/discovery in international arbitration proceedings.

7.5 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?

The following rules apply to the production of testimony:

- **Summoning Witnesses.** Section 13(a) of the Arbitration Law provides that the arbitrator’s authority to summon witnesses to testify or to require a witness to produce documents is identical to that of the courts, and that the arbitrator may award such witnesses remuneration and expenses. Notwithstanding, the court may, upon the application of a summoned witness, cancel the summons if it finds that an abuse of arbitration proceedings was involved in the summons (Section 13(c) of the Law). The court also has the authority to summon witnesses and to award them remuneration and expenses (Section 16(a)(1) of the Law).

- **Provision of Testimony.** The duties and immunities of a witness who testifies in arbitration proceeding are identical to those of a witness who testifies in court (Section 13(b) of the Law). If a witness refuses to testify, the court may, at the request of the arbitrator or a party to the arbitration, order the witness to testify and take coercive and/or punitive measure against such witness (Section 16(a)(2) of the Law).

- **Manner of Procuring Testimony.** Under Section 14 of the Law, the testimony of a witness, including a party to the arbitration, shall be taken under oath or affirmation, unless the arbitrator and the parties have agreed that such is unnecessary, provided that such witness shall not be obligated to provide testimony under oath or affirmation in circumstances in which it would not have such obligation in a court. It should be noted, however, that today, in general Israeli law, the obligatory oath and “affirmation” to convey the truth have been cancelled and replaced by the obligation of the judicial authority to warn the witness that he or she must testify truthfully. In the relevant literature, the opinion has been voiced that despite Section 14, the obligation to give an oath or “affirmation” in arbitration proceedings should also be waived, while a similar warning to the witness should suffice. Thus, testimony should be taken, in an arbitration proceeding, after a witness, including a litigant, has been warned that “he must testify the whole truth and nothing but the truth and that he will be liable to the penalties prescribed by the law if he acts otherwise” (Section K of the Schedule). Strussman, at 169-170.

- **Interrogation of Witnesses.** The Arbitration Law does not relate to the matter of witness interrogation. In the relevant literature, however, an opinion has been voiced that even in arbitration, which may not be bound by the procedural rules which apply in court, it is desirable that the interrogation of witnesses be conducted manner in which it is conducted in court: direct examination by the party which summoned the witness, cross-examination by the other parties, and re-examination by the first. Strussman, at 171. It should be noted that a witness’ testimony may be submitted in an affidavit, whereas the witness will only be cross-examined and re-examined in person.

- **Expert Witnesses.** The arbitrator may, at any stage of the proceedings and after allowing the parties sufficient opportunity to state their cases, direct that the matter be referred to the opinion of an expert, to be appointed by the arbitrator. The parties may object and demand an examination of the expert, as though the expert were a witness testifying on behalf of the arbitrator. Where the arbitrator has notified the parties in advance that he or she intends to take such action, and the parties have not objected, the arbitrator may refrain from hearing the evidence brought by other experts with respect to a matter, which has been referred to the arbitrator’s expert (Section L of the Schedule).

8 Making an Award

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

The following are the legal requirements that apply to the making of an arbitral award:

- **Structure of the Award.** An arbitral award must be in writing and must be signed by the arbitrator, indicating the date of signature. Where the arbitration is conducted before several arbitrators, the signatures of a majority of such arbitrators are sufficient to make an award, if the award indicates that the other arbitrators are unable or unwilling to sign it (Section 20 of the Arbitration Law). It is important to note that an arbitrator has no obligation to state the reasons for the award, unless so directed by the arbitration agreement. C.A. 1325/92 Cocler v. Diplomat PD 47(3) 89.

- **Legal Effect of the Award.** The arbitral award is binding upon the parties and their successors as res judicata, unless otherwise suggested by the arbitration agreement (Section 21 of the Law). The award may not derogate from the rights of a third party who is not a party to the arbitration agreement. C.A. 2328/97 Cohavi v. Aronfeld (Unpublished).

- **Term for the Making of the Award.** The arbitrator must make an award within the earlier of three months from the day upon which he or she began to deal with the dispute, or upon which he or she was called upon to so arbitrate the dispute by a party via written notice. The arbitrator may, however, extend the term by up to three additional months, unless otherwise determined by the parties (Section O of the Schedule).

9 Appeal of an Award

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

Parties are not entitled to appeal an arbitral award. The Supreme Court has justified the logic behind denying the right to appeal in the case of an arbitral award, by explaining that the object of the institution of arbitration is to constitute an alternative to the court system, not a preamble that leads to it. Thus, intervention in awards, which may cause arbitration to become just another stage in the proceedings between the parties, which will ultimately find their resolution in court, is to be avoided.
C.App. 113/87 Netivei Ayalon Corp. v. Yehuda Shlanger and Sons Ltd. PD 45(5) 511. Thus, the proceeding that is available to one who wishes to attack an award is not an appeal, but rather an application to set aside the award. Under Section 24 of the Arbitration Law, the court may, at the request of a party, set aside, supplement, amend or remit an award to the arbitrator for any one of the following causes of action:

- the arbitration agreement was not valid;
- the award was made by an arbitrator not properly appointed;
- the arbitrator acted without authority or exceeded the authority vested in him or her by the arbitration agreement;
- a party was not given sufficient opportunity to state his or her case or produce evidence;
- the arbitrator did not determine one of the matters referred to him for determination;
- the arbitrator did not assign reasons for the award despite the fact that the arbitration agreement required him to do so;
- the arbitrator did not make the award in accordance with the law despite the fact that the arbitration agreement required him to do so;
- the award was made after the term required for making the award had expired, and a party notified the arbitrator in writing, before the award was made, that he or she reserves the right to make such a claim;
- the content of the award is in conflict with public policy; and
- there exists a cause, upon which a court would have set aside a final, non-appealable judgment.

It should be stressed that this list of causes is a closed list, and the court may only set aside, supplement or amend an arbitral award based on the above ten causes of action.

When a court addresses an application to set aside an arbitral award, it does not review the considerations taken into account by the arbitrator or the application of substantive law. Rather, the court reviews the conduct of the proceeding. Thus, for example, an arbitral award may not be set aside due to the arbitrator’s mistaken application of substantive law, even if the arbitration agreement requires him to apply the substantive law (other than in cases in which the cause for setting aside the award is that it is in conflict with public policy). C.App. 1260/94 Ben Haim v. Hen PD 48(4) 826; Strussman, at 257-291.

10 Enforcement of an Award

10.1 Has your country signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? What is the relevant national legislation?

Yes. Israel has signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Convention has been in effect since June 7, 1959. Sections 6 and 29A of the Arbitration Law provide that in cases in which an international convention to which Israel is a party applies to the arbitration, and such convention includes provisions regarding stay of proceedings, confirmation of an award or setting aside an award, such provisions shall apply to the arbitration.

Subsequent to the signing of the New York Convention, the Enforcement of the New York Convention (Foreign Arbitration) Regulations-1978 was legislated. These regulations include provisions regarding applications for the confirmation of foreign awards and rules of procedure, which are to be applied in foreign arbitration proceedings.

10.2 What is the approach of the national courts in your country towards the enforcement of arbitration awards in practice?

In Israel, an award does not require the confirmation of the court. Thus, where the relevant parties respect and execute the arbitral award, they do not require the stamp of the court. However, where the enforcement of an award requires that it be presented before various enforcement institutions, such as execution offices, land registry bureaus, etc., the award must first be confirmed by the court before it may be presented to such authorities. The application to confirm such award must be brought before a court of jurisdiction, and the court may confirm the award at the request of a party. Objections to the confirmation of an award are submitted as applications to set aside the award, Where no such application is submitted in the time allowed, the court will confirm the award. An award which has been confirmed by the court is treated, in all respects, except as regard to appeal, as a judgment of the court (Section 23 of the Arbitration Law), and will be enforced by the execution offices or, where necessary, with the aid of any of the other instruments listed in the Contempt of Court Ordinance. Strussman, at 254-256.

11 Confidentiality

11.1 Are arbitral proceedings situs in your country confidential? What, if any, law governs confidentiality?

Although it is commonly accepted that one of the defining characteristics of arbitration proceedings are their confidentiality, Israeli law, whether specific to arbitration or in general rules of evidence, does not include any provisions regarding the confidentiality of such proceedings. Despite the fact that no specific rule with regard to confidentiality exists in legislation, it seems that in Israel, the practice is to preserve the confidentiality of arbitration proceedings. This confidentiality is expressed in that parties to the arbitration do not bring third parties, who are not related to the arbitration, to such proceedings, nor do they publicize or convey information regarding the arbitration to third parties. Ottolenghi, at 312. An opinion has been voiced in the literature that claims that a party may obtain an injunction against another party to the arbitration where it is apparent that the latter intends to publicise information regarding the arbitration, by claiming the latter has not acted in good faith. The parties to the arbitration may, of course, agree that the arbitration will be privileged and confidential, which would constitute a confidentiality agreement.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied upon in subsequent proceedings?

This matter also remains unclear, as it has not yet been dealt with in legislation. On the one hand, the general obligation to act in good faith may be said to require that information disclosed and documents presented during the course of arbitration should only be used in the
specific arbitration. Thus, any attempt to use such information for other purposes would constitute a breach of the good faith doctrine. On the other hand, some may argue that the rule that applies to information disclosed in court, which allows for the use of such information for other purpose by the parties to the litigation, applies to arbitration proceedings as well.

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

See the answer to Question 11.1 above.

12 Damages/interests/costs

12.1 Are there limits on the types of damages that are available in arbitration (E.g., punitive damages)?

An arbitrator has the authority to grant any type of damages that the court is competent to grant, unless the parties have determined otherwise, limiting the arbitrator’s authority to grant relief to a specific type of damages. Where the parties have agreed to subject the arbitration to substantive law, all of the limitations which apply to a court ruling under substantive law shall apply to the arbitrator as well. Thus, for example, as Israeli law does not allow for punitive damages to be awarded in civil proceedings (although this may change in the near future), where an arbitrator is bound by substantive law, he or she too may not award such damages. On the other hand, where an arbitrator has not been subjected to substantive law, and especially where an arbitrator has been authorized by the parties to do so, the arbitrator may award punitive damages, subject to the fact that excessive punitive damages may be construed by the court as conflicting with public policy.

12.2 What, if any, interest is available?

An arbitrator may have the authority to award interest (i) where the agreement between the parties determines the interest to which an injured party will be entitled in a case of breach, and (ii) where the parties explicitly authorized the arbitrator to award interest and set the interest rate. In addition, if the agreement does not refer to interest, the arbitrator will have the authority to award interest, pursuant to the Award of Interest and Linkage Law – 1961, unless the agreement’s silence with respect to this matter is interpreted as expressing the intention of the parties to deny the injured party the right to interest or to deny the arbitrator’s authority to award interest. The Interest and Linkage Law authorizes any judicial authority, including arbitrators, to award interest for the term commencing on the date at which the relevant debt was created, or any date thereafter, and ending on the date at which the debt is paid. Thus, an arbitrator has the authority to award interest, not only for the period leading up to the arbitral award, but also for the period thereafter, and until the debt is paid by the indebted party. However, an arbitrator whose authority to award interest is based on this Law, may not award interest at a rate higher than that which is provided by the law. Where an arbitrator exceeds this limitation, he is in fact overstepping the bounds of the authority vested in him, and this portion of the arbitral award will be set aside or amended by the court (Section 24(3) of the Arbitration Law). Where an arbitrator does not award interest, the parties may request that he or she amend the award in this respect (Section 22(a)(3)).

12.3 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?

Unless otherwise determined by the parties to the arbitration, the arbitrator may, in his or her discretion, make any order with respect to the expenses of the parties, including attorneys fees, and remuneration and expenses of the arbitrator. The arbitrator may also direct that these amounts be deposited or that a security be given for these amounts, and unless the arbitrator orders otherwise, the parties will bear his or her remuneration and expenses in equal parts (Section R of the Schedule). In arbitration, the arbitrator will generally shift the arbitration expenses, including legal fees and the arbitrator’s remuneration and expenses born by the winning party, in whole or in part, to the losing party.

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

Arbitration awards are subject to any regular tax that may apply to the subject matter of the arbitration. Thus, for example, where the award enforces a transaction of sale of shares or another asset, or payment of amounts due, the award will be subject to Israeli income tax provisions and/or any other tax provisions that apply to such transaction or payment.

13 General

13.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in your country? Are certain types of disputes commonly being referred to arbitration?

In recent years, the use of arbitration has become more frequent. In major commercial transactions, parties commonly refer to arbitration as the preferred method of dispute resolution due to its many advantages. Even in the absence of an arbitration agreement, when a dispute arises, parties may decide to refer a matter to arbitration and avoid litigation in court. In addition, even where a matter is brought before the court, if the court finds that a dispute is suitable for arbitration, subject to the consent of the parties, it may refer the matter to arbitration, and set the terms of such arbitration (Section 79B of the Courts Law). Arbitration institutions do exist in Israel; however, parties are generally free to select an arbitrator or institution of their choice. A wide variety of disputes are referred to arbitration and no certain type may be singled out as being commonly referred to arbitration.

13.2 Are there any other noteworthy current issues affecting the use of arbitration in your country?

The courts in Israel are in favour of arbitration proceedings. This attitude is reflected in the judgments and orders issued by the courts, which generally enforce arbitration agreements, broadly interpret the jurisdiction of arbitrators, and rarely and only in limited circumstances interfere with the arbitrator award.
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