Israel

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Introduction

The governing statutory framework for arbitration in Israel is the Arbitration Law 1968. The Law was amended twice. In 1974, the Law incorporated specific provisions relating to the enforcement of foreign arbitration agreements and awards, and in 2008, it expanded the limited control of courts over arbitration awards, by enabling parties to agree that the award will be subject to appeal before the court. When the parties so agree, the court has discretion to grant a leave for appeal, if it deems that there is a fundamental legal mistake in the award, which may cause a miscarriage of justice.

There are no separate legislative frameworks for domestic and international arbitrations in Israel. However, the Arbitration Law includes specific provisions relating to the recognition and enforcement of international arbitration agreements and awards, different from the provisions regarding domestic arbitration agreements and awards.

Israel was one of the first countries to sign the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It signed the Convention in 1959 and in 1974 the Convention became the law of the land. Consequently, the Regulations for the Execution of the New York Convention (Foreign Arbitration) that govern procedural matters regarding the recognition and enforcement of foreign arbitral awards were enacted in 1978.

While the Arbitration Law does not define the term 'international arbitration', it defines the term 'foreign arbitration award' as an award that was made outside of the state of Israel. Thus, it could be inferred that an arbitration seated outside Israel is considered international. Interestingly, however, some court decisions fail to recognise the international character of arbitrations seated outside Israel, and as a consequence apply in relation to them those provisions in the Law that relate to domestic arbitrations.

Israeli courts play a role during the various stages of arbitration – before the tribunal is constituted, during the arbitration proceedings and after the award has been rendered. With respect to international arbitration the role that the courts play relates to enforcement of arbitration agreements and the recognition and enforcement of international arbitral awards. The following provides an analysis of current Israeli law on these matters.

Enforcing arbitration agreements in Israel

Under the Arbitration Law, when a party breaches the arbitration agreement and brings a claim to court, the other party may file a motion to the court for stay of proceedings. The jurisdiction of the courts to enforce arbitration agreements is set in the Arbitration Law in two separate arrangements: the general arrangement applies to domestic arbitrations and the specific arrangement concerns international arbitrations.

Enforcement of domestic arbitration agreements

Stay of proceedings in an arbitration seated in Israel is governed by article 5 of the Arbitration Law. The article grants the court discretionary power to refuse to stay proceedings if it finds a 'special reason that the matter should not be decided in arbitration'. 'Special reason' is a broad term, which is subject to the court's interpretation. There are broadly three categories of special reasons applied by the courts: the first concerns the arbitration agreement, the second relates to procedural efficiency, and the third embodies reasons of judicial policy. The category focusing on the arbitration agreement includes cases in which courts have justified their refusal to stay proceedings on the ground of impossibility of enforcement. The category of 'special reasons' concerns procedural efficiency and involves cases where enforcing the arbitration agreement would obstruct the purpose of settling the dispute quickly and efficiently. One such reason is the imminent delay in arbitral proceedings. If the delay is caused by the party applying for the stay, a motion for stay of proceedings will be denied. Another cited reason is the avoidance of multiple proceedings in arbitration and in court. Where some parties to the court proceedings are not parties to the arbitration agreement, the court may deny the motion for stay. The category of 'special reasons' involving judicial policy includes reasons directly related to the legal system, such as public policy reasons that justify that the dispute should be heard before a public court and not in a private arbitration. Another reason for refusing to stay of proceedings is when the court deems that the dispute should be decided according to substantive law (and not independently of it).

Enforcement of international arbitration agreements

Stay of proceedings in international arbitration is governed by article 6 of the Arbitration Law. The article incorporates the enforcement provision of article II(3) of the New York Convention, which denies the court any discretionary power and directs it to 'refer the parties to arbitration' unless it finds that the agreement 'is null and void, inoperative or incapable of being performed'.

Despite broad international acceptance of the mandatory referral rule in article II(3) of the Convention, Israeli courts have not fully recognised it. Although there are instances where a court's rhetoric suggests recognition of this principle, a close analysis of the case law reveals that, in fact, Israeli courts have failed in various instances to follow a uniform discourse on the issue. Hence, it is not possible to construct a single narrative of all legal decisions showing a clear and consistent approach on the matter. While one could expect the courts to take a clear stand on the matter and follow a uniform approach denying discretionary power and mandating referral to arbitration once the conditions of Article II(3) are met, not all decisions follow this approach.

In order to make sense of the diverse judicial opinions, I will offer a short typology of the different approaches taken by the courts regarding the mandatory character of referral to arbitration.

The typology is structured along three distinctive lines, which centre on the different approaches of the court toward the lack of discretionary power in the enforcement of arbitration agreements.

The first approach adheres to a strict application of the Convention, and acknowledges the mandatory character of the referral to arbitration. The decisions that fall under this approach can be divided into two groups: those which follow the literal application of article II(3) of the Convention, and those that leave leeway for the court in its application of the article. The decisions that follow the literal application hold that courts lack any discretion on the matter, as the Convention calls for mandatory referral. The decisions that follow a broad approach apply broadly the three exceptions to the mandatory referral to arbitration set in the article. By broadening the borders of this exception the court demonstrates a tendency to endow itself with discretionary power to refuse to stay proceedings in cases where not all the parties to the court proceedings are parties to the arbitration agreement, even though no discretion has been granted to it.

The second approach uses a rhetoric that allegedly suggests acknowledgment of the lack of discretionary power of the court, but refrains from acting upon it. This line of thought states at the outset that the court lacks any discretion in the application of article II(3) of the Convention, but then in the application of the Convention it ignores this statement and proceeds to subject the article to further conditions or additions, such as requiring the applicant for stay of proceedings to prove that he was ready to pursue arbitration, or to subject the application for stay to the domestic doctrine of good faith. Interestingly, the court did not question the appropriateness of its decisions. In other words, the court did not even consider the fact that those further conditions and additions are contrary to the uniformity principle of the Convention and, thus, hurt the certainty of its implementation.

The third approach explicitly endows the court with broader discretionary power than the limited one provided in article II(3) of the Convention. As shall now be explained, the Israeli Supreme Court added a fourth exception to the exceptions in article II(3) of the Convention, namely - the public policy exception.

In a landmark case *LA 4716/04 Hotels.com v Zuz Tourism Ltd*, the Supreme Court (Justice Grunis) held that the list of exceptions in article 2(3) of the Convention is not exhaustive as 'there may be exceptional cases in which the court may refrain from staying proceedings, even if none of the exceptions above apply. However, these cases will be rare.'

In *LA 1817/08 Teva Pharmaceutical Industries Ltd v Pronauron Biotechnologies, Inc*, a claim concerning pharmaceutical experiments that were allegedly conducted negligently was filed in court in breach of an arbitration agreement. In deciding on a motion to stay proceedings, the Supreme Court held that public policy is a ground for denying the motion for stay, even if none of the exceptions stated in article 2(3) of the Convention exists. Justice Rubinstein held that there is a public interest in having a public hearing on the matter, since the dispute has broader implications than those on the disputing parties. He added that since the applicable substantive law was Israeli law, denying the motion for stay will not cause any harm to the parties' expectations. Justice Procaccia, who was in agreement with Justice Rubinstein, held that there may be special reasons that justify refusal to stay proceedings. In Justice Procaccia's opinion, when the matter in dispute exceeds the parties' interests, the court has discretion to refrain from staying proceedings. Justice Danziger who was in minority, held that the fact that the matter in dispute may have an effect on third parties is not a justifiable ground for departing from the strict provisions of the Convention. In his opinion, public policy grounds are not relevant to the enforcement of foreign arbitration agreements.

In a later decision, *LA 3331/14 Siemens Ag v Israel Electric Company Ltd*, the Supreme Court (Justice Amit) stressed again that the Court has discretion to refuse staying proceedings even when none of the exceptions in article II(3) of the Convention exists. In this case, Justice Amit held that when a party claims that the other party acted fraudulently, it is in the public interest that the claim be heard in an open court and not in arbitration.

There is no doubt that denying the mandatory character of referral to arbitration stands against the clear wording of the Convention and hence hurts the uniformity of its worldwide application.

A question arises as to the reason for the courts' failure to apply article II(3) of the Convention in the same manner expected from all courts of contracting states. What is the rationale for denying the court's lack of discretionary? My contention is that the court's attitude stems from an emotive disposition toward the denial of its discretionary power. In other words, the court felt uncomfortable with the denial of its discretionary power. This contention is supported by the words of Justice Strassberg-Cohen of the Supreme Court in *LA 1407/94 Mediterranean Shipping v Credit Lyonnais* holding that 'depriving the court of its discretionary power, which is at the very heart of the art of judging, causes some discomfort'. Therefore, while the Court was aware of its lack of discretionary power, its awareness was not translated into decisions applying the Convention strictly, and this was because it simply chose not to do so.

The arbitration award

The Arbitration Law provides for separate procedures regarding the enforcement of domestic and foreign arbitral awards and the recourse against them. These will be analysed separately.

Confirmation and means of recourse against domestic awards rendered in Israel

A domestic award is subject to confirmation proceedings before the court. Once the award is confirmed it is treated as a judgment of the court, and it can be submitted to the execution office for enforcement.

There are two means of recourse against domestic awards – setting aside the award and an appeal on the award. Each shall be discussed briefly.

Setting aside domestic arbitral awards

The Arbitration Law provides for a closed list of grounds for setting aside the award. When a party files a motion to set aside the award, the court may set aside the award, wholly or in part, supplement it, correct it, or remit it to the arbitrator. Thus, setting aside is not the only remedy for challenging the award. In fact, setting aside is a remedy of last resort. Article 24 of the Arbitration Law provides that the court may set aside the award on any of the following grounds: (1) there was no valid arbitration agreement; (2) the award was made by an arbitrator not properly appointed; (3) the arbitrator acted without authority or exceeded the authority vested in him in the arbitration agreement; (4) a party was not given a suitable opportunity to state his case or to produce his evidence; (5) the arbitrator did not decide one of the matters referred to him for determination; (6) it was stipulated in the arbitration that the arbitrator shall state the reasons for the award and the arbitrator did not do so; (7) it was stipulated in the arbitration

agreement that the arbitrator shall decide in accordance with the law and the arbitrator did not do so; (8) the award was made after the period for making it had expired; (9) the content of the award is contrary to public policy; (10) there is a ground on which a court would have set aside a final, non-appealable judgment.

The court's authority to set aside the award is discretionary. In fact, pursuant to article 26 of the Law, the court may refuse to set aside the award, even if any of the grounds in article 24 exists, when it finds that no miscarriage of justice was caused. Thus, the court may confirm the award, even if there is a ground for setting aside, when it is of the opinion that there was no miscarriage of justice. Once confirmed, the award can be executed.

The list of grounds for setting aside the award is exhaustive and the parties cannot agree to limit or expand it. However, following the amendment to the Arbitration Law in 2008, the parties may agree that their award will be subject to appeal before an arbitrator. In this case, the list of grounds for setting aside the award is limited to the 9th and 10th grounds of article 24, namely, the award is contrary to public policy, and there is a ground on which a court would have set aside a final, non-appealable judgment.

An application for setting aside the award must be brought within 45 days from the day the award was delivered to the applicant. However, when the application for setting aside the award is based on the ground set in article 24(1), namely, that there was no valid arbitration agreement, there is no time limit. Additionally, where the application is based on the ground set in article 24(10), namely, that and there is a ground on which a court would have set aside a final, non-appealable judgment, the time limit of 45 days begins on the day when the facts were discovered (article 27(b) and (d)). The court may extend these periods, even if they have already expired, if it considers that there are special reasons to do so. When an application for confirming the award is filed, the time limit for filing an objection to the application for confirmation is 15 days. Once the award is confirmed by the court, there is no possibility to set it aside. The only exception is an application based on the 10th ground, which can be made even though the award was confirmed (article 27(d)).

Appeal on domestic arbitral awards

The amendment to the Arbitration Law introduced in 2008 enables the parties to choose between two forms of appeal – appeal before a second arbitral instance and appeal before the court.

Appeal to a second arbitral instance

Article 21A of the Arbitration Law sets out the conditions for an appeal to a second arbitral instance. The parties may agree on the appeal when entering the arbitration agreement or any time afterwards. If the parties so agree, the award has to be reasoned.

The arbitrator hearing the appeal may hold meetings in the presence of the parties and request written submissions. However, the arbitrator shall not hear witnesses, unless otherwise agreed by the parties. The award, which has to be reasoned, could be then subject to a setting-aside procedure before the court on two grounds only: the content of the award is contrary to public policy; or there is a ground on which a court would have set aside a final, non-appealable judgment. That is, once the parties agree that the award shall be subject to appeal before a second arbitral instance, the award in the appeal could be set aside on the above two limited grounds only.

Appeal to a court

Article 29B of the Arbitration Law provides for the possibility of parties to agree that their award shall be appealed before the court. In this case, the arbitrator has to be bound by substantive law (interestingly, the default rule in the Arbitration law is that the arbitrator is not bound by substantive law). It should be stressed that the appeal is not as of right. The court may grant leave to appeal if it finds that there is a fundamental mistake in the application of the law in the award which may cause miscarriage of justice. Thus, the appeal could be heard only with the leave of the court, provided that the two conditions specified appear. This leaves the court to hear appeals on awards in rare occasions. Simple mistakes of law or mistakes that may not cause miscarriage of justice are not grounds for granting leave to appeal. Therefore, parties that agree that the award shall be subject to appeal cannot know in advance whether the court will grant leave to appeal or not. Put differently, when entering an arbitration agreement and agreeing that the award will be subject to appeal before the court, the parties are not certain that such appeal shall be heard.

Where an appeal on the award has been filed to the court, the court shall not hear an application for setting aside the award, as the parties may raise arguments during the appeal which relate to setting aside of the award pursuant to any of the grounds in set out in section 24.

Enforcement of foreign arbitral awards

Article 29A of the Arbitration Law provides that 'an application for the confirmation or the setting aside of a foreign award which is subject to an international convention to which Israel is a party, and the convention lays down provisions as to the matter in question shall be filed and heard in accordance with and subject to those provisions'. While the article refers to an application for the 'confirmation or the setting aside of a foreign award' it actually concerns an application for the enforcement or refusal to enforce a foreign award.

There is little case law concerning the enforcement of foreign arbitral awards. Interestingly, unlike in the case of enforcement of foreign arbitration agreements, the attitude of Israeli courts towards the enforcement of foreign arbitral awards is to adhere strictly to the provisions of the Convention and not to interpret the grounds for refusal of enforcement widely.

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Adv Dr Kapeliuk is a partner in the commercial and international litigation department of the Goldfarb Seligman law firm. She is considered the leading Israeli expert on international and domestic arbitration.

Dr Kapeliuk has particular experience in the fields of private international law, jurisdictional matters, conflict of laws, enforcement of forum selection clauses and international arbitration agreements and enforcement of foreign judgments and foreign arbitral awards.

Dr Kapeliuk represents foreign and domestic clients in complex international business disputes. Her many years of expertise, both as a leading scholar and as a consultant, enable her to provide unique, far-reaching legal advice to her clients.

Prior to joining Goldfarb Seligman, Dr Kapeliuk was a leading scholar and lecturer in the fields of domestic and international arbitration and private international law. For several years, she has taught courses in her fields of expertise in Israel's leading law faculties, and has published scholarly articles in major law reviews, such as *Cornell Law Review* and *Texas Law Review*. As the only academic expert on Israeli arbitration law, she was called upon to provide expert opinions in proceedings held in foreign courts.

Adv Dr Kapeliuk frequently advises legislators and government bodies on issues concerning arbitration law. She was an invited expert to the meetings of the Constitution, Legislation and Law Committee of the Israeli parliament, with respect to a Bill amending the Arbitration Law, and a Bill amending the Courts Law by including a section on mandatory arbitration.