ARBITRATION. THE ISRAELI REPORT

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1. The Law of Arbitration of 1968 is the main source of rules regulating Arbitration. The general view is that arbitration is a voluntary process, agreed by the parties either in their general contract, in an *ad hoc* agreement after the dispute has arisen, or even after a legal claim has been submitted to the Court.

2. Mandatory arbitration exists, even though only in very few, restricted, areas, such as specific labour relationships; economic arrangements with regard to debts of agriculturers in cooperative societies' settlements; proprietary rights in land with relation to projects of town planning, etc.

2.2. There are very few mandatory arbitration for the settlement of controversies, which otherwise couldn't be subject to arbitration on the basis of the parties' will. Such are, for instance, arbitrations concerning the *status* of "a continuing son" in a cooperative settlement.

3. Arbitrators may be appointed by the parties themselves in their contracts, prior to the dispute, or after a dispute has evolved between them; by a third party, nominated by the parties to nominate the arbitrator; or by the court (according to Sec. 8 of the Law), in case no arbitrator has been nominated otherwise. The same applies for nominating a substitute arbitrator, when the arbitrator has resigned, died, or was removed by the court from his position (Sec. 12).

3.1. When the parties in voluntary arbitration have decided to choose an arbitration institute, the arbitrators would be nominated according to the regulations of that institute and the parties would have to accept that. (Generally, as is the case in many arbitration institutes, the arbitrators are nominated by the secretariat from a list of arbitrators, who were formerly elected by the institute's authorities).

3.2. In mandatory arbitrations the arbitrators are appointed according to the specific laws, with no influence of the parties on their appointment.

3.3. The arbitrators should disclose to the parties —or to the nominating authority— any fact that might have influence on their impartiality. Apart from risking the award to be set aside, once the impartiality is discovered (according to Sec. 24(10) of the Law of Arbitration), the arbitrator risks to be legally sued for breach of confidentiality (according to Sec. 30 of the Law).

3.4. There is no specific set of rules for arbitration with more than two parties. The Schedule to the Law, which is regarded as the arbitration agreement between the parties unless otherwise stipulated, provides for a chairman to be chosen in such a case; and where the number of arbitrators is pair —for an additional arbitrator or for an umpire to be elected. However, the parties may agree otherwise (Sec. 2).

3.5. There are very few specific rules with regard to the relation between the parties and the arbitrators.The Law of Arbitration mentions the arbitrator's duty of impartiality (Sec. 30), the right of the arbitrator to receive payments from the parties unless otherwise stipulated (Sec. 31; and the Courts Law provides for arbitration *pro bono* when the parties to a dispute before the Small Claims Court agree to arbitrate-Sec. 65); the right of the arbitrator to delay the arbitration proceedings or the delivery of the award until he/she is paid (Sec. 33 of the Law of Arbitration).

4. The Law of Arbitration empowers the courts to delay proceedings when there is an arbitration agreement between the parties (Sec. 5), to appoint arbitrators (Secs. 8, 12) and remove them (Sec. 11), to issue orders in order to help the arbitrator (Sec. 16), such as:

1. The summoning of witnesses and the determination of their remuneration and expenses.
2. The adoption of coercive and punitive measures against a witness who has not answered a summons of the arbitrator or of the court or has refused to testify.
3. The taking of evidence forthwith or out of the jurisdiction.
4. Substituted service of notices or documents on the litigants.
5. The attachment of property, the prevention of departure from Israel, security for the production of property, the appointment of a receiver, a mandatory injunction and a prohibitive injunction.

In addition, the court may extend periods for acts of the arbitrator (Sec. 19) even when they have already elapsed, reduce the arbitrator's remuneration, if it deems excessive (Sec. 32), set aside the award (Sec. 24), amend it (Secs. 22 and 26), confirm it (Secs. 23, 28), etc.

4.1. No, unless there is an arbitration agreement that the plaintiff has ignored. The Court can try to convince the parties to refer their dispute to arbitration (Sec. 79B of the Courts' Law), but may not impose it on them.

4.2. In Israel the competence-competence rule does not apply. The arbitrator cannot decide upon his/her own competence, unless the parties have specifically authorized him/her to do so.

4.3. The parties may refer to the arbitrator both jurisdiction plea as well as a plea on the merits of the case. Unless specifically required by the parties, the Schedule exempts the arbitrator from the material rules of law; so when a judicial dispute is referred to arbitration, the parties should include an obligation to decide according to the law.

4.4. The authority of the arbitrator ceases once the court starts to deal with the same dispute. When arbitration proceedings have already been initiated, a party may apply to the court for an injunction against the continuing with the arbitration.

4.5. When a lawsuit is brought to the State Court even though there exists an arbitration clause, the Court may refuse to deal with the matter and stay its own porceedings, thus giving preference to the parties' will to arbitrate. The default chosen by the Law is to stay proceedings, unless special reasons exit that justify that the matter would not be dealt with by arbitration.

When the court refuses to stay the proceedings —preference is to the State Court to deal with the matter, not to the arbitrators.

4.6. The court may refrain from dealing with the matter, out of respect to the parties wish to arbitrate.

4.7. The Court may issue an injunction to the arbitrators not to deal with the matter until the court decides upon a preliminary question.

4.8. The Court would not suspend its own proceedings while waiting for the decision of an arbitrator.

5.1. In an *ad hoc* arbitration the parties may decide on the proceedings. If they prefer to arbitrate before a specific Arbitration Institute, they would have to adhere to its own rules of procedure, unless it alows for some

requirements on their part (such as the time for giving the award, the material law to be applied, etc.).

5.2. In a mandatory arbitration the power of the parties to stipulate the rules of arbitration is sometimes addressed by the law.

5.3. The arbitrators are not supposed to collect testimonies by themselves: they are supposed to refer only to the evidence brought before them by the parties. They may ask, however, for an expert opinion (enabling the parties to cross-examine him/her), and they may visit the *situs,* preferably while accompanied by the parties.

5.4. The parties, as well as the arbitrator, may refer to the court for the summoning of witnesses, when a witness refuses the summoning by the arbitrator (Sec. 16).

5.5. Call on third parties is admitted in arbitration, when an arbitration agreement concerning the dispute between the plaintiff and the defendant exists between the defendant and the third party as well.

Third parties cannot intervene in arbitration proceedings, nor can they ask for setting aside the arbitration award, if they feel affected by it. They can then only make a separate lawsuit against a party if they fear that the latter would affect their rights.

5.6. If the question relates to arbitration proceedings between the same parties, the answer is positive. If it relates to arbitration proceedings between different parties, concerning the same facts and the same dispute matter, then arbitration proceedings may be connected with the consent of the parties, even though it is very rare.

6.1. Arbitrators can render both declaratory awards as well as constitutive awards.

6.2. Arbitrators can deliver summary measures; however, if not implemented voluntarily by the parties, a problem may arise concerning their official execution. The Law of Arbitration recognizes a formal confirmation by the court of an award, not of a decision by the arbitrator. The parties would have to refer to the court to get the same measures, so as to be efficient.

6.3. The same as 6.2.

7.1. Every subject matter that can be agreed by parties in their contract may be referred to arbitration (Sec. 3).

7.2. The parties cannot refer to arbitration rights that cannot be disposed of by themselves.

7.3. Yes.

7.4. Controversies with regard to matters which are statutorily regulated (*jus cogens*, such as matters of *status*, special legally protected rights of workers, orders for liquidating a company, etc.) cannot be referred to arbitration.

7.5. Yes.

7.6. Rights that the parties may agree upon in their contract.

7.7. Yes.

7.8. Yes. Such is generally the case in arbitration between an insurance company and the insured person.

8.1. Parties may prescribe for different set of rules of procedure than those prevailing in court; may provide for an arbitration instance of appeal (very common in arbitration institutes); and agree that the award would not consist a *res judicata* between them (the statutory proposal of a default is that it does form *res judicata* between the parties, Sec. 21). The parties may not agree about the Court's powers concerning an intervention in an arbitration award.

8.2. No.

8.4. It depends upon the reason of the nullity of the contract.

9. Arbitration is a proceeding that ends by an award. When the parties reach an agreement it may settle their dispute, but not by an award, unless they ask the arbitrator to confirm it by an award.

The parties may authorize the arbitrator to suggest an assessment agreement, but it would not constitute an arbitral award, unless agreed by the parties and thereby confirmed by the arbitrator as an award, for reasons of official execution.

10. An expert opinion agreed upon by both parties may be accepted by the arbitrator as a conclusive evidence to that point.

10.1. An expert opinion is not regarded as an award. Therefore it cannot be set aside out of the reasons for setting aside an award. It may be set aside for reasons of lack of *bona fide,* the expert having exceeded his authority, having obtained the information wrongfully, etcetera.

11. There is no formal relation between arbitration and conciliation. Parties may empower the arbitrator to try first a conciliation, and if he/she does not succeed —to continue with arbitration proceedings.

11.1. No, unless prescribed so by the parties.

11.2. No. On the opposite: too much of a pressure by the arbitrator on the parties to reconcile might be viewed as partiality on his part.

11.3. It might be, by an experienced arbitrator; but is not a part of the method.

12. Mediation has been introduced by the Courts' Law as a voluntary means for solving disputes. Parties may refer to mediation privately or be referred to it by the judge, when they file a legal action in the State court.

12.1. There are forms of mediation and conciliation administered by private institutions.

12.2. There are Regulations dealing with the qualifications of a mediator, the agreement between the mediator and the parties, his powers, etc.

12.3. Mediation is a voluntary proceeding. It is always subjected to the State's jurisdiction.

12.4. There is no formal relation between mediation and arbitration. Parties may agree, when mediation fails, that the mediator continues to act as an arbitrator. They may also authorise the arbitrator, by mutual consent, in whatever stage of arbitration, to try and mediate between them.

13. No. The validity of the award is determined by the Law of Arbitration, which renders it as a *res judicata* between the parties unless agreed otherwise (Sec. 21), and once it is confirmed by the court, it has the validity of a court's judgement (Sec. 23).

14. When the parties to a dispute agree upon a solution, they may refer it to the court for its confirmation, so as to give it a formal validity.

15.1.

15.2. The consequence of an arbitration award is *res judicata* between the parties, unless they have agreed otherwise (Sec. 21). They cannot agree otherwise with regard to a court's judgement. Arbitration award cannot have any effect on third parties, unless they are successors of the parties. Court's judgement, on the contrary, has an effect *in rem*.

15.3. According to the Israeli Law of Arbitration there is no right of appeal against an arbitration award. The only application to the court with regard to an award is by a plea to set it aside, which is statutorily limited to 10 specific grounds (Sec. 24). The time limit for such a request is 45 days from the date of the award having been submitted to the parties (Sec. 27), or to only 15 days from the date of an application for its confirmation (under the Procedure in Matters of Arbitration Regulations).

When no request for setting aside the award is submitted to the court, the court is empowered to confirm the award, with no time limit. Thus it may confirm an award even though it suffers from all the negative characteristics mentioned in this question, (which form by themselves grounds for setting it aside). However, there is still a possibility to ask for an extension of the time to bring an application to set aside the award. It should be noted, however, that even though there exists a ground to set aside the award, the court might refuse to do so, if it is of the opinion that no miscarriage of justice has been caused (Sec. 26).

16. Matters of constitutional nature cannot be submitted to arbitration.

17. In arbitration institutes, generally a second instance of appeal is admitted.

18. When there is an internal instance of appeal, the reasons for appealing an award are the same as those for an appeal against a judgement of the court.

As a rule, there is no appeal on arbitral awards to the court. Instead, there are 10 grounds for setting it aside by the court (Sec. 24):

1. The arbitration agreement was not valid.
2. The award was made by an arbitrator not properly appointed.
3. The arbitrator acted without authority or exceeded the authority vested in him by 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 determine one of the matters referred to him for determination.
6. The arbitrator did not assign reasons for the award tough the arbitration agreement required him to do so.
7. The arbitrator did not make the award in accordance with the substantive law tough the arbitration agreement required him to do so.

8. The award was made after the period for making it had expired.
9. The contents of the award are contrary to public policy.
10. A ground exists on which a court would have set aside a final, non-appealable judgement.

19. Because of the time-limit for applying to the court for setting aside the award, this application would be the first to be dealt with. When the State judge would reject the application to set aside the award, it is instructed to confirm it (Sec. 28), thereupon granting an executive validity to the award.

20. Israel is a party to international conventions dealing with arbitration of transnational private disputes. The Law of Arbitration refers to these conventions, both with regard to staying proceedings as well as to their implementation. The New York Convention for the Execution of Foreign Awards has been adopted, with special Regulations dealing with it.

21. An arbitration award that is confirmed by the court is executed just like a court judgement (Sec. 23).

22. The Arbitration Law refers to international conventions; and the Implementation of the New-York Convention (Foreign Arbitration) Regulations have been enacted already in 1978.

23. The above mentioned Regulations.

24. The distinction between national awards and foreign awards is according to their definition in the New York Convention.

25. When foreign proceedings are conducted before a foreign judge while concerning the same subject matter dealt with by the national arbitration proceedings, the latter would wait the judgement.

26. A foreign arbitration clause prevails over the authority of the Israeli court. The latter is instructed by the Israeli Law of Arbitration to delay its proceedings, thus stating that the courts have no jurisdiction in the matter (Sec. 6). Such priority is also recognised to pending foreign arbitration, with regard to internal arbitration proceedings.