

How (Not to) Object to a Stay of Proceedings under the Israeli Arbitration Act

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[Tamar Meshel \(University of Alberta Faculty of Law\)](#)

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In April 2014, Tiulei Hagalil and Klal Teufa, two Israeli companies providing tourism and flight services, commenced an action against Royal Jordanian Airlines and two other respondents in the Israeli District Court for monetary and declaratory relief (*Tiulei Hagalil Transport (1987) Ltd. and others v. Royal Jordanian Airlines and others*, Tel-Aviv-Jaffa District Court, 56420-03-14, 15 June 2014). Tiulei Hagalil had been Royal Jordanian's exclusive representative in Israel for twenty years. In its action, Tiulei Hagalil claimed that the respondents had conspired to steal Royal Jordanian's business from it, that Royal Jordanian owed money to Tiulei Hagalil and refused to pay, and that it instead unilaterally decided to realize a bank guarantee issued to it by Klal Teufa.

Royal Jordanian applied to the District Court for a stay of the proceedings on the basis of an arbitration clause contained in its agreement with Tiulei Hagalil. The arbitration clause provided for Jordanian law as the governing law but did not specify a seat of arbitration. In their respective submissions, both sides raised many of the arguments frequently encountered in stay of proceeding cases that come before the Israeli courts. First, Tiulei Hagalil and Klal Teufa claimed that since the arbitration clause did not specify a seat, any arbitration would take place in Israel and thus Article 6 of the *Israeli Arbitration Act, 1968* ("IAA"), which governs stay of proceedings in arbitrations subject to an international convention, does not apply to it. In reply, Royal Jordanian claimed that since it had suggested to Tiulei Hagalil to appoint a Jordanian arbitrator and the arbitration agreement provided for Jordanian law as the governing law, the agreement should be considered as foreign and Article 6 applied to it.

Second, Royal Jordanian claimed that even if the arbitration agreement were not considered as foreign, a stay of proceedings should be granted under Article 5 of the IAA. This article governs domestic arbitrations and requires that a party requesting a stay prove it was, and still is at the time of the request, willing to do all that is necessary to conduct the arbitration. Tiulei Hagalil and Klal Teufa claimed in reply that Royal Jordanian did not satisfy this requirement since it was uncooperative and unilaterally realized the bank guarantee issued to it by Klal Teufa.

Third, Tiulei Hagalil and Klal Teufa claimed that the joinder of an additional claimant and two additional respondents that were not signatories to the arbitration agreement would lead to contradictory decisions and that a stay of proceedings should therefore be denied. In turn, Royal Jordanian argued that the existence of the non-signatories as parties to the proceedings did not prevent a stay since the arbitration agreement should be enforced against its signatories even at the cost of splitting the case.

In June 2014, the District Court rendered its decision and granted the stay of proceedings. The Court followed the pro-arbitration tradition of the Israeli courts in stay of proceeding cases (see, e.g., *S. Elia Holdings Ltd. v. Ron Itzhaky; Sohnut Mehoniyot Layam Hatihon Ltd. (Car Agency for the Mediterranean Sea Ltd.) v. KIA Motors Corporations, et al*), noting as a starting point that it would prefer to uphold the arbitration agreement and stay the proceedings. To do so, however, Royal Jordanian, as the party requesting the stay, had to prove that it was willing to do all that was necessary to conduct the arbitration in accordance with Article 5(c). The Court noted that a party that was not willing to conduct the arbitration in the past and brought the dispute before the court would not be able to request a stay of proceedings in favor of an arbitration it had objected to before. Once court proceedings have commenced, the emphasis should be placed on past behavior rather than current willingness to conduct the arbitration. The Court found on the facts, however, that Royal Jordanian did and continued to do all that was necessary to conduct the arbitration. It held that Royal Jordanian's failure to address its alleged debt to Tiulei Hagalil in a meaningful way did not amount to a complete failure to respond, since it did provide Tiulei Hagalil with a counter-demand. The Court also found that Royal Jordanian's self-help move of realizing the bank guarantee did not constitute a failure to conduct the arbitration, but rather simply triggered a contractual provision contained in the parties' agreement.

The Court also applied the two-step formula set out by the Israeli Supreme Court on the issue of joinder of non-signatories. First, it inquired whether there was procedural urgency in the joinder or rather a party wishing to evade the arbitration agreement. It found that providing the bank guarantee did not make Klal Teufa an integral part of the dispute and that the guarantee was merely part of its internal relationship with Tiulei Hagalil. Therefore, the Court held that Klal Teufa's joinder was not necessary for the resolution of the dispute and was not a valid reason to refuse a stay of proceedings. On the other hand, the Court noted that since Tiulei Hagalil raised claims against all three respondents, the participation of the two non-signatory respondents in the proceedings appeared on its face to be necessary and appropriate. Second, the Court examined whether there was substantive necessity in joining the non-signatory respondents, i.e., an essential need not to split the proceedings in order to allow the court to award an effective remedy to the claimant and avoid contradictory findings. The Court found that since the arbitration agreement provided for arbitration according to Jordanian law, there might indeed be contradictory findings if the proceedings were split. However, the Court ultimately held that the remedies Tiulei Hagalil and Klal Teufa were seeking from Royal Jordanian differed from those they were seeking from the two non-signatory respondents and thus it was not necessary to conduct the proceedings jointly either as a matter of procedural or substantive necessity.

Finally, the Court agreed with Royal Jordanian that Article 6 of the IAA and the New York Convention governed this case. The Court noted that the Convention applied to two types of arbitration awards: those that were 'foreign', i.e., rendered outside of Israel, and those that were rendered in an arbitration 'not considered domestic', i.e., conducted in Israel but involving foreign parties. The Court found that the arbitration in this case would either be conducted in Jordan and therefore considered as 'foreign', or it would be conducted in Israel, but would still be considered as 'not domestic' since the governing law was Jordanian law, Royal Jordanian was a Jordanian company, the parties' business transactions were international in nature, and they were headquartered in different countries. Moreover, the Court noted that according to Israeli jurisprudence, no weight was to be given to the fact that non-signatories to the arbitration agreement were involved in the proceedings where Article 6 of the IAA applied and the case was not extraordinary. Accordingly, the Court held that the proceedings must be stayed and the dispute referred to arbitration.

The decision of the District Court reflects a pro-arbitration interpretation of the IAA that has been frequently applied by the Israeli courts in the past, and highlights the obstacles facing a party who

wishes to object to a stay of proceedings where the dispute is subject to an arbitration clause, whether foreign or domestic. Once more, the mere joinder of non-signatories to the proceedings and the application of a narrow and technical reading of the requirements of the IAA have proven not to be up to the task.