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Israel Adopts the International Commercial Arbitration Law: Will the Courts Play Along?

Daphna Kapeliuk (Goldfarb Gross Seligman & Co) · Thursday, March 7th, 2024

On 12 February 2024, Israel achieved a significant milestone in the promotion of international commercial arbitration with the enactment of the International Commercial Arbitration Law, 2024 (the "ICA Law"). The ICA Law, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (the "Model Law"), is a substantial change to the existing arbitration legal regime governing international commercial arbitration.

History of Arbitration Legislation in Israel

Prior to the adoption of the ICA Law, the governing statutory framework for arbitration in Israel was the Arbitration Law, 1968 (the "Arbitration Law"). The Arbitration Law, which repealed the Arbitration Ordinance of 1926, enacted by the British Mandatory authorities in Palestine (which ruled in Palestine following a mandate from the League of Nation in between 1922 and 1948), mirrored the English Arbitration Act of 1889. However, it did not incorporate further changes that had been implemented in arbitration legislation in England in 1934 and 1950. The Arbitration Law governed both domestic and international arbitration.

The Arbitration Law has been amended three times. In 1974, the Arbitration Law included specific provisions relating to the enforcement of foreign arbitration agreements and awards, by incorporating the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") into the law. Since the Arbitration Law does not define the term "international arbitration", the distinction between domestic and international arbitration was made by way of reference to the term "foreign award", which was defined in Section 1, as an award rendered outside Israel. Consequently, under the Arbitration Law, an arbitration was considered international (to which the provisions of the New York Convention would apply) when its seat was outside the state of Israel. In 2008, the Arbitration Law was amended by incorporating provisions regarding the supervisory role of courts on arbitral awards, in particular regarding appeal on arbitration awards both before an arbitrator or the court. In 2018, the Arbitration Law incorporated an amendment on the jurisdiction of the courts in matters concerning arbitration. Prior to the amendment, the courts having jurisdiction with respect to matters concerning arbitration were the District Courts (which are at the second level in a three-level court system consisting of the Supreme Court, the District Courts, and the Magistrate Courts). Following

the amendment, the courts having jurisdiction are those that have jurisdiction, in accordance with any law. Thus, for example, the Magistrate Courts have jurisdiction with respect to arbitration, in disputes that they would have jurisdiction if the matter was litigated in court. This amendment, which intended to relieve the backlog of the District Courts, did not prove to be beneficial to the development of a solid arbitration jurisprudence, as the Magistrate Courts which were not specialized in matters concerning arbitration (whether domestic or international) rendered decisions on these matters, which in some cases created confusion and lack of coherence.

The ICA Law

With a view to promoting Israel as a place for arbitration in international commercial disputes, Israel has opted for the adoption of the Model Law. This post focuses on certain specificities in the ICA Law, regarding (1) its scope of application, (2) a stay of proceedings, (3) the court having jurisdiction, (4) the number of arbitrators, and (5) leave to appeal on certain court decisions.

Scope of Application

While under the Arbitration Law, international arbitration was considered as an arbitration seated outside the state of Israel, the ICA Law followed the criteria set out in the Model Law for international arbitration. The draft of the ICA Law (the "Draft Law") omitted the alternative set out in Section 1(3)(c) of the Model Law, according to which an arbitration is international if "the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country". However, during the deliberations of the Constitution, Law and Justice Committee of the Israeli Parliament for the preparation of the Draft Law for a second and third reading, it was suggested that the autonomy of the parties to agree that their dispute relates to more than one country should be respected and the option was added in Section 3(c)(3) of the ICA Law, by following the wording of the Model Law.

While the ICA Law applies to international commercial arbitration, it does not provide a definition or an explanation of the term "commercial" in the text or in a footnote. However, in the explanatory text of the Draft Law, reference is made to Section 1 of the Model Law, according to which "the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of commercial nature, whether contractual or not".

The Court Having Jurisdiction

Unlike in the Arbitration Law, in which the court having jurisdiction with respect to arbitration are the same courts having the jurisdiction with respect to such matters in court litigation, Section 7 of the ICA Law excludes the Magistrates Courts as courts that may have jurisdiction with respect to arbitration. The Section provides that the courts having jurisdiction under the ICA Law, are the courts having jurisdiction to hear the dispute, to the exclusion of the Magistrates Courts, in which case the District Courts shall have jurisdiction. It is hoped that the fact that the District Courts will have jurisdictions in matters concerning the ICA Law, and not the Magistrate Courts, will assist in the development of a solid and coherent body of case law, based on the international origin of the

Model Law and promote the use of international commercial arbitration in Israel.

Enforcement of Arbitration Agreements

Section 9(a) of the ICA Law incorporates the provision on enforcement of arbitration agreements in the Model Law, which is based on Article II(3) of the New York Convention. This provision was also included by reference in the Arbitration Law through the amendment in 1974. Section II(3) of the New York Convention mandates a court of a contracting state when seized of an action in a matter in respect of which the parties have made an arbitration agreement:

> "shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or in capable of being performed."

While the mandatory referral rule in Article II(3) of the New York Convention is explicit, Israeli courts have not fully recognized it. A close analysis of the case law reveals that the courts have failed to follow a uniform discourse on the interpretation of the article by way of expanding the exceptions of Article II(3) and refusing to enforce an arbitration agreement in instances that do not fall into one of the exceptions stated in the article, such as public policy grounds. As the adoption of the ICA Law aims at promoting international arbitration in Israel, it is hoped that the courts will depart from decisions which are not coherent with the article and follow a uniform approach on the matter.

The Number of Arbitrators

According to Section 11(c) of the ICA Law, when the parties have not agreed on the number of arbitrators, the tribunal will consist of three arbitrators. The ICA Law added a subsection, which does not appear in the Model Law, which concerns a conflict between the parties' agreement on the number of arbitrators and the relevant provisions of arbitration rules adopted by the parties. Section 11(b) of the ICA Law provides that when the parties have agreed on the number of arbitrators whether by agreement or way of reference to arbitration rules, the terms of the parties' agreement will prevail, unless it is stated in the arbitration rules that these rules prevail over the parties' agreement.

Leave for Appeal on Certain Court Decisions

Departing from the Model Law, the ICA Law provides that the following decisions by a court having jurisdiction in regards to arbitration may be appealed to a higher instance (typically the Supreme Court) if leave is granted by the appeal court: decisions on the appointment of an arbitrator (Section 12(e)); decisions on the challenge of an arbitrator (Section 14(d)); decisions on the termination of the arbitrator's mandate (Section 15(c)); and decisions on the tribunal's jurisdiction (Section 17(g)). It should be noted, that leave to appeal is granted in exceptional cases

only, where a question of principle that goes beyond the individual interest of the parties arises, or when the court's intervention is required for reasons of justice or to prevent a serious miscarriage of justice. Thus, while the leave to appeal reflects a position in which the court decision on these matters may not be final, but subject to appeal, it has been introduced to ensure some supervisory power of the appellate court. However, as leave to appeal is kept for special cases, it could be expected that only a scant number of decisions will be heard by the Supreme Court.

Conclusion

The adoption of the ICA Law is a significant step towards the promotion of international arbitration in Israel. It is hoped that the courts will understand the importance of a uniform application of the Model Law and that, in their interpretation of the ICA Law, they shall have regard to the Model Law's international origin and the need to ensure the observance of the principle of good faith and to promote uniformity in its application at the international level.

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