The Israeli Institute of Commercial Arbitration

INTERNATIONAL NEWSLETTER OF THE ISRAELI INSTITUTE OF COMMERCIAL ARBITRATION

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A NEW ERA AT THE ISRAELI INSTITUTE OF COMMERCIAL ARBITRATION

By Adv. Uriel Lyn

President of the Tel Aviv & Central Israel Chamber of Commerce and
President of the Federation of Israeli Chambers of Commerce

The Israeli Institute of Commercial Arbitration was founded in 1991 by the Federation of Israeli Chambers of Commerce and by the late Prof. Smadar Ottolenghi, who served as its first President for 13 years, until her passing.

The primary goal of the IICA has been to support the entire business community and to resolve disputes in the most efficient, economical and amicable manner. Over the years, the IICA has gained an outstanding reputation throughout the Israeli business community.

The IICA is Israel's leading arbitral institution. Since its establishment, the IICA has gained vast experience in conducting *thousands* of arbitrations in every business sector, including real estate, corporate, communications, construction, commerce and more.

Upon Judge Ayala Procaccia's (ret.), former Supreme Court Judge, readiness to head the IICA, and together with Adv. Gila Rabinovitch, the Institution's Manager, with many years of experience in administering arbitration procedures, ***the IICA is entering a new era.***

The IICA is expanding its scope of activities: the pool of arbitrators and mediators engaged in the IICA currently includes senior officials from the Israeli legal system, judges and attorneys, and outstanding expert professionals with invaluable legal experience.

This new International Newsletter will enrich all of us in advancing the arbitration procedures in our country.

Uriel Lynn

The Israeli Institute of Commercial Arbitration

Introductory Remarks by Ayala Procaccia, (Ret.)
Justice of the Supreme Court,
President of
The Israeli Institute of Commercial Arbitration

I am honored to welcome you to the Inaugural Edition of the International Newsletter of the Israeli Institute of Commercial Arbitration (IICA), edited by Adv. Eric Sherby.

This important event coincides with the 25th anniversary of the establishment of the IICA.

The IICA was founded in 1991 by the Federation of Chambers of Commerce, and inspired by the late Prof. Smadar Ottolenghi. Since its early days, the IICA has set as its public goal to institute an organizational infrastructure for the administration of arbitration proceedings as alternative means for resolving disputes, both domestic and international. Promoting such goal offers the parties the opportunity to benefit from the immense advantages of arbitration proceedings relating, among others, to the ability to shape the procedural and substantive framework of the dispute resolution process, affect its efficiency and exercise the selection of the arbitrator and the venue.

The Inaugural Edition of the International Newsletter includes several interesting articles in the field of international arbitration. It exposes the reader to important issues in this complex area, dealing both with substantive and practical issues. Its publication conforms with the IICA initiative to respond to the general public interest in promoting alternative routes of dispute resolutions, and specifically those of international character. Important as may be the exposure to arbitration issues in the domestic context, there is special interest in international arbitration issues due to the growing awareness of the great advantages of international arbitration, based on mutual consent of the parties, and utilizing the flexibility and efficiency of the procedural proceedings. The closer the international business world becomes, greater is the need for a consensual apparatus for resolving international commercial disputes. No less important is the need to administer international arbitration within an organized body which sets norms of professional excellence, ethical regulations, efficiency rules and reasonable costs for arbitration proceedings.

The IICA administers international arbitrations and is committed to administer them pursuant to these norms.

I extend my thanks to the authors of the articles in this issue, and to its excellent editor, Adv. Eric Sherby. I expect future issues of this important newsletter of the Institute to be published regularly -- contributing to the professional dialogue and enhancing the practical experience both of lawyers who are regularly involved in international arbitration as well as those less directly involved.

We hope that the IICA's International Newsletter will encourage readers to send their comments, and enrich the Newsletter with articles addressing important issues in international arbitration that are of interest to the wide professional public.

With Best Wishes,
Ayala Procaccia

Doing Business With China: Is Your Arbitration Clause Worth The Paper on Which It Is Written?

By Anthony Poon,[1] Philipp Hanusch,[2] and Andrew Chin[3]

Editor's Note:

Because of the increasing need for Israeli lawyers who are involved in international commerce to become familiar with issues involving China, we thought it appropriate for the Inaugural Edition of our Newsletter to include an article – written specifically for Israeli practitioners – authored by an international law firm with a substantial presence in China. We selected Baker & McKenzie (http://www.bakermckenzie.com/) not only because of its vast familiarity with the field (with approximately 100 lawyers in China) but also because it has demonstrated, by sending several partners in recent years to participate in legal conferences in Israel, its commitment to the Israeli market. -- E.S.S.

Introduction

Since diplomatic relations with China began in 1992, Israeli-Sino trade volume has risen steadily, from US$50 million in 1992 to US$9.9 billion in 2012. Chinese technology powerhouses, such as Alibaba and Baidu, have visited Israel frequently in recent years, looking to purchase Israeli start-ups and export their technology back to China. Prominent Chinese companies like China Civil Engineering Construction Corporation are being engaged to carry out the tunnel boring works for the Carmel Tunnel in Haifa. Areas of cooperation between Israel and China have extended to almost all areas such as technology, education, arts, tourism, and academia.

With increasing volume of bilateral trade, comes the question of how to resolve disputes. From the point of view of an Israeli company involved in a dispute with a Chinese company, court litigation in Israel is not practical because there is no reciprocal treaty on enforcement of court judgments between Israel and China, which means that enforcement in China of an Israeli judgment is, albeit possible, difficult and uncertain. Court litigation in China is also impractical because (among other reasons) Chinese court proceedings have to be conducted *in Chinese* and there is (whether justifiable or not) a perceived lack of complete independence of Chinese courts.

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[1] Anthony Poon is a partner in the Hong Kong office of Baker & McKenzie ("**B&M**"). His practice involves both international arbitration and complex commercial litigation in many areas, such as product liability, media and insolvency litigation. He has acted for many companies in China related disputes and has represented a solar power investor in international arbitration in Hong Kong. The authors would like to thank David Zaslowsky, chairman of B&M's Litigation Department in New York, who was instrumental in the writing and supervision of this article. Further, the authors would like to thank Shen Peng and Hailin Cui (both B&M, Beijing) for their assistance.

[2] Philipp Hanusch is a senior associate in B&M's Hong Kong office. His practice focuses on international commercial arbitration. He has represented parties in institutional arbitrations under the ICC Rules, HKIAC Rules, CIETAC Rules, Vienna Rules, and ICDR Rules, and in *ad hoc* arbitrations under the UNCITRAL Arbitration Rules.

[3] Andrew Chin is an associate in B&M's Hong Kong office. He specialises in international commercial arbitration and construction litigation. He has represented parties in international arbitrations conducted under the ICC Rules, HKIAC Rules, CIETAC Rules, and SIAC Rules.

Therefore, international arbitration has become the preferred dispute resolution mechanism for Israeli-Sino contracts.

Advantages of Arbitration for Israeli-Sino Contracts

The key advantage of arbitration for Israeli-Sino contracts is the ease of enforcing awards. China and Israel are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). Signatory states are required to enforce awards from 155 other signatory states subject to very narrowly construed exceptions, such as an invalid arbitration agreement or a violation of due process. Accordingly, awards rendered in arbitrations administered by the Israeli Institute of Commercial Arbitration would be enforceable in China through the New York Convention.

There still exist some practical problems in enforcing awards due to perceived local protectionism and the relatively conservative attitude of Chinese courts towards arbitration. However, the enforcement courts' attitude towards foreign awards has significantly improved in recent years as a result of a more active and supportive policy of the Supreme People's Court ("**SPC**") in general and an ***internal prior reporting system*** in particular, which aims at ensuring that enforcement courts adhere to the spirit of the New York Convention. Under that system, when an application to enforce a foreign award has been filed before an Intermediate People's Court and that court is inclined to refuse enforcement, it must report its finding, for review purposes, to the Higher People's Court and, if the Higher People's Court agrees with the finding of the Intermediate People's Court, it must report its opinion to the SPC for approval. A decision by the Higher People's Court or the SPC that the award should be enforced is binding on the lower courts.

A second key advantage is the ability to arbitrate disputes in a neutral forum thereby avoiding litigation in each other's home courts. In those cases in which the contract calls for a sole arbitrator, we generally recommend appointing an arbitrator of *neutral* nationality in order to avoid any perception of bias. (This is the default position under the rules of some arbitral institutions, including the Hong Kong International Arbitration Centre.)

A third key advantage of arbitration for Israeli-Chinese contracts is that the parties can agree that the arbitration proceedings be conducted in English, so that neither party has to arbitrate in the language of the other party.

Drafting Arbitration Clauses for Arbitration With Chinese Parties

Many arbitration clauses for Sino-foreign contracts provide for arbitration in Hong Kong. Because Hong Kong is a common law jurisdiction and a special administrative region of the PRC, Hong Kong has a unique position in international arbitration. Hong Kong has a strong reputation for upholding the rule of law and offering a fair and neutral forum for resolving disputes. Mainland Chinese parties regard Hong Kong as a culture-friendly venue due to its geographical proximity and shared cultural and language backgrounds. Hong Kong's judiciary is very supportive of international arbitration, and the Hong Kong arbitration community has a large pool of capable and renowned arbitrators. Importantly, Hong Kong has an excellent track record in respect of enforcement of arbitral awards in Mainland China. We are not aware of any decision in Mainland China in the past five years refusing enforcement of an award made in Hong Kong.

In some circumstances, Israeli parties would have to accept Mainland China as the seat of arbitration. For example, Chinese law requires that contracts that have no non-Chinese element must be governed by Chinese law and that disputes arising from such contracts must

be arbitrated in China. Israeli-Sino contracts would normally be outside this restriction, unless an Israeli company contracts with the Chinese counterparty using a wholly owned Chinese special purpose vehicle, popularly known as a Wholly Foreign-Owned Enterprise (WFOE). A WFOE is considered a ***Chinese*** domestic entity, and any dispute involving it might be considered a domestic matter if the transaction takes place wholly in China.

In other cases, such as Israeli-Sino contracts in sensitive areas (e.g. exploitation of natural resources within China), contracts must be governed by Chinese law, but may be arbitrated outside China.

If the place of arbitration must be ***in China***, Israeli parties should take note of three points when drafting the arbitration clause.

1. Chinese arbitration law does not recognise ad hoc arbitration (for arbitrations seated in China) and requires that arbitrations in China be administered by a Chinese arbitration institution that has been established under the relevant regulations of the Arbitration Law of the PRC. Accordingly, awards rendered in China in ad hoc proceedings or by a foreign arbitration institution are not enforceable in China. The arbitration clause must therefore specify a Chinese arbitration institution to administer the arbitration. While there are numerous arbitration institutions in China, only a few of them have expertise in international arbitrations, such as China International Economic and Trade Arbitration Commission (CIETAC), Shanghai International Arbitration Center (SHIAC), and Shenzhen Court of International Arbitration (SCIA). When our law firm's non-Chinese clients have to arbitrate in China, we routinely recommend CIETAC, the best known institution.

2. The choice of arbitration must be clear and unequivocal. Neither party may reserve for itself the option to choose between court litigation and arbitration, as otherwise the arbitration clause would be considered invalid under Chinese law and an award would be liable to be set aside by the Chinese courts.

3. Chinese parties usually have a preference for three member tribunals because it enables them to appoint one arbitrator who shares their cultural background. Arbitration rules for Chinese arbitration institutions typically include a requirement that arbitrators must be chosen from a panel, or roster of names, maintained by the institution, unless the parties expressly reserve the right to choose arbitrators from outside the panel. It is therefore important that, if the parties agree that there shall be three arbitrators, the arbitration clause specifies that parties have a right to appoint arbitrators from outside the panel, so as not to unduly restrict the pool of suitable and available arbitrators. Moreover, the clause should make clear that the third arbitrator must be of neutral nationality to avoid an unbalanced tribunal in terms of nationality. CIETEC's panel includes arbitrators who are experienced in common law countries, in particular arbitrators residing in Hong Kong.

Enforcement of Foreign Arbitral Awards in China

When an Israeli company wins an arbitration against a Chinese company, the Israeli company might have to enforce the award against the Chinese party in China. The application process for enforcing an award in China is as follows.

Timing: The Israeli company should apply for recognition and enforcement of the award within two years from the last day of performance specified in the award or two years from the date of the award (if the award does not specify a time for performance).

Court: The Israeli company should file the application with an Intermediate People's Court where the Chinese party is domiciled or where its assets are located.

Procedure: The Israeli company has to pay (i) an "acceptance fee" (currently around US$ 80) to the court for accepting the application and (ii) an application fee which is calculated based upon the amount in dispute; for example, if the amount of the award to be enforced is US$ 5 million, the application fee is currently around US$ 32,000. Provided that the application meets the formal requirements, the court will docket the application and notify the Chinese respondent. If the respondent wishes to resist enforcement, it has to file a statement of defence within a time limit designated by the court (usually within 15 days from receipt of the notice). The enforcement court must render a decision on enforcement within two months of docketing the application. However, in practice enforcement courts often do not follow this requirement. In our experience, the court may take 3 to 5 months or even longer to make a decision.

Enforcement: Once the court grants enforcement of the award, it will be treated like a Chinese court judgment and enforced in the same way. Enforcement processes could include freezing the Chinese counterparty's assets or selling them without the need to commence liquidation.

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The number of disputes is usually proportionate to the volume of bilateral trade. With negotiations on a free trade agreement between Israel and China expected to yield a positive outcome, Israeli companies can better protect its rights if they adopt a properly drafted arbitration clause in contracts with Chinese counterparties.

In Focus: International Rules of the Israeli Institute of Commercial Arbitration (IICA)

By Eric S. Sherby

*Editor's Note: This column will be a regular feature of our Newsletter, focusing on a specific Rule of the **International** Rules of the IICA.*[4] *– E.S.S.*

One of the reasons that non-Israeli business people do not like to litigate before Israeli courts is the problem posed by *language*. Simply put, non-Israeli business people don't speak Hebrew.

Although most Israeli courts will accept witness declarations in English, that is where our courts stop being "visitor-friendly." Hebrew is the language of the pleadings and motions, substantially all hearings are conducted in Hebrew (a litigant offering testimony from a witness who does not speak Hebrew will usually be required to pay the costs of an interpreter), and decisions by the courts are rendered in Hebrew. For the non-Israeli party to a legal proceeding, litigation in Israel involves *substantial translation costs*.

Therefore, for the non-Israeli business person involved in a deal with an Israeli company, the "Hebrew problem" is an obstacle to be avoided when considering, at the contractual stage, the issue of dispute resolution.

But what about arbitration? Many people (lawyers and business people alike) assume that, if an international agreement is written in the English language, any arbitration regarding that agreement will, necessarily, be conducted in English.

Not necessarily. The author has been involved in *several* Israeli arbitrations that were conducted predominantly in *Hebrew* – even though the arbitration agreement was in English, ***and*** even though a significant number of witnesses were non-Israelis who did not speak Hebrew, ***and*** even though all of the Israeli witnesses were fluent in English. In other words, sometimes even in arbitration the non-Israeli party will be forced to incur *substantial translation costs*.

Enter Rule 6.2(a) of the International Rules of the IICA. Rule 6.2(a) provides that, when the language of the arbitration agreement is English, "the arbitration shall be conducted in English, unless the parties agree otherwise." In other words, when the arbitration agreement is in English, the issue of language is not one that is left to the "discretion" of the arbitrator or of the IICA. (There are only two, minor, exceptions, both of which would not apply if the arbitration agreement expressly states that the language of the arbitration is to be English.)

Who benefits from Rule 6.2(a)? At first glance, it might appear that the rule benefits the non-Israeli party – because in the absence of that rule, the Israeli party might be able to "force" the non-Israeli party to conduct the arbitration in Hebrew. But such an analysis overlooks the reality of the negotiating process – if the non-Israeli company were to know that it might be forced to *arbitrate in Hebrew*, it would never agree to arbitrate in Israel in the first place.

Because arbitration is a creature of contract, absent a binding arbitration agreement, there will ***not*** be any arbitration.

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[4] Our International Rules can be accessed at http://eng.borerut.com/international-rules/

Therefore, to a great extent, ***Rule 6.2(a) works to the benefit of the Israeli party that wants to make the Israeli forum more attractive to the non-Israeli party***.

When an Israeli party to an international agreement succeeds in persuading the non-Israeli company that any arbitration will take place in Israel, the Israeli company knows with certainty that it will save time and money. When the arbitration is conducted here at home, the Israeli party's savings are substantial – there is no need to put witnesses or legal counsel on an airplane, and there is no need to put them in hotels. In addition, as a general matter, the hourly rates charged by Israeli lawyers are ***lower*** than those of lawyers in the major international arbitration centers.

Because it is almost *unheard of* for an Israeli company that is active in the international arena to be unable to conduct an arbitration in English, the slight inconvenience of conducting the proceeding other than in Hebrew is far outweighed by the convenience and savings of conducting the entire proceeding *here at home*.

When we were drafting our International Rules, we at the IICA were mindful of the fact that the overwhelming majority of international agreements involving Israeli companies are executed in English. Our research revealed that, other than arbitral institutions in countries in which English is an *official* language, ***no*** other national arbitral institution has a rule like Rule 6.2(a). In other words, we believe that ***no*** other institution (other than in a country in which one of the official languages is English) gives international business people such a high level of certainty that, if a dispute arises, the language for resolving it will be the language of the international agreement.

Therefore, for the Israeli company involved in an international negotiation, Rule 6.2(a) is one of the best tools in its arsenal for persuading the non-Israeli party to agree to ***Israel*** as the contractual forum for dispute resolution.

Eric S. Sherby, Adv.
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Arbitration — General Counsel's Perspective

By William Weisel

An Israeli general counsel ("GC"), especially in a hi-tech industry, works in a fast-paced and dynamic environment. Consequently, a GC's primary concern is risk management, especially when litigation is involved. In view of the increasing risk and spiraling litigation costs, alternative dispute resolution ("ADR") has become an essential component in managing a company's legal affairs -- especially when one is dealing with international agreements, which raise jurisdictional and choice of law issues that are difficult to assess or quantify.

A GC considers ADR, including arbitration, at the negotiating stage. Because litigation is fraught with variables, unanticipated costs and undesirable ramifications, it is imperative to control the process as much as practicable. Even when the business people have the best of intentions, GCs routinely include arbitration provisions in contracts in order to ensure that smooth dispute resolution processes are built into the relationship in advance. Arbitration is one of the ways to establish some level of control over an otherwise volatile process.

By definition, arbitration is a formal, extrajudicial process of adjudicating a dispute in a manner agreed by the parties. GCs use arbitration to quickly resolve matters while significantly reducing legal fees and costs, and to minimize the disruptive effect of litigation on a company's internal resources. Oftentimes, companies utilize arbitration as a way to "choose their judge" as opposed to leaving the selection of the adjudicator to the random vagaries of a court clerk.

Israeli GCs must deal with disputes and litigation on two levels – when dealing with Israeli parties in Israel's legal system, and when confronted with lawsuits abroad. Consequently, Israeli GCs are continually challenged to ensure that the company's contracts contain the necessary protection if the deal goes wrong.

When only Israeli parties are involved, GCs routinely look to the local Israeli system of mediation and arbitration to resolve many of their disputes. ADR is firmly established in Israel, and arbitration is often promoted by the courts as a way to move cases along more quickly. Consequently, GCs do not often insist upon arbitration clauses in domestic agreements simply because that alternative is already well known and on the table even after lawsuits have been filed.

The situation, however, is quite different when Israeli companies do business abroad. Parties from different countries – including Israelis – usually insist that their respective country's laws and jurisdiction apply to the contract that is being negotiated. These conflicting demands often becoming a sticking point in the negotiations. For the GC, even if s/he consults local counsel in the country of the other company, it is difficult to assess the processes and costs related to the management of commercial disputes in a foreign country.

Among the questions that arise are: What is nature of the foreign judicial system? What does it cost to bring or defend an action in that foreign country? How long will it take to reach a resolution? Will the contract be enforceable, and can a fair hearing even be obtained?

When a foreign party rejects the request for Israeli law and jurisdiction, binding arbitration by an impartial arbitrator in a neutral country with whose laws and legal processes both parties are acquainted can neutralize many of these concerns. This may not be the optimal choice of the Israeli GC, but throughout the world, arbitral institutions have flourished by providing adverse parties with a reasonable level of assurance that disputes can be resolved at reasonable cost without resorting to the courts of either party, and they can provide necessary lists of experienced arbitrators. Furthermore, such institutions are more flexible today than they were, let's say, twenty years ago insofar as allowing parties to dictate the terms and conditions of conducting an arbitration.

It is a significant benefit for Israeli companies that are expanding to third world markets to be able to manage dispute resolution in a manner that is comparable with the judicial system in Israel.

Some of the companies where I served as GC over the past two decades were involved in substantial litigation both in Israel and abroad. My strategy was to resolve those lawsuits as quickly and cheaply as possible because they were a drain on the company's resources and left open potential liabilities. I found that many cases required creative solutions, some of which involved the use of binding arbitration. These included full blown trials, blended mediation where a mediator was eventually requested to make the final arbitral decisions, and finally the instance where we asked an arbitrator to read no more than a ten page brief from both parties and to make a one word decision — "yes or no" — that was to be sent via email to counsel. By being creative, we were able to resolve disputes quickly and fairly, and at a reasonable cost relative to the amounts at issue.

Despite the obvious advantages of arbitration, not all GCs include arbitration clauses in all contracts. At times, a company might be in a stronger position in a transaction where it could more easily afford the expense of court litigation and thereby put the other party at a disadvantage in future disputes. Conversely, the weaker party might consider it to be advantageous for it to request an arbitration clause (as well as other ADR alternatives) in order to avoid the cost of litigation and the potential damage to important relationships. Israeli companies should take this into consideration, especially when dealing with the industrial giants who seem to have unlimited appetites and funds for litigation.

But *not* all GCs see arbitration as a universal fix. There are varied opinions as to the efficacy and true cost savings that it can offer. With respect to disputes in the United States, I have heard GCs state that arbitrations ultimately turn into all-out slugfests which are better suited for formal courtrooms, or that it eventually costs the same as a court trial.

In my experience, Israeli GCs generally find arbitration to be a good idea because it provides a flexible and broad approach for dispute resolution, but it is just one implement in a GC's

toolbox that needs to be considered along with the other tools within the context of circumstances that exist at the time. But arbitration remains as a primary choice that is usually on the table, and if used properly could make a GC a more efficient and productive manager of a company's legal affairs.

The author has had over two decades of experience as General Counsel of Israeli companies, most recently with Lumenis Ltd. He can be reached at bill.weisel5@gmail.com

The Draftsman's Corner: Remember The "Carve-Out"

By Eric S. Sherby

The conventional wisdom when drafting an arbitration clause is to draft ***broadly*** – in a manner that encompasses any possible future dispute *"arising from, related to, or concerning"* the contractual relationship or the subject matter of the contract.

But can an arbitration clause be ***too*** broad? The answer is yes, *sometimes* an arbitration clause can be drafted in a manner that causes a judge to hesitate – in some cases, even *refuse* – to grant emergency/temporary relief.

This article elaborates on the problem and suggests a solution.

We start with a simple (and not uncommon) fact scenario:

- An Israeli high-tech company, which has a competitor in Singapore, enters into a joint venture agreement with an American company;
- The JV agreement contains an arbitration clause (for these purposes, it doesn't matter whether the place chosen is Israel or the US);
- Under the agreement, the American partner covenants (of course) not to disclose trade secrets of the Israeli partner;
- Months later, after the Israeli partner has shared trade secrets with its JV partner, the Israeli company learns that the American partner is doing business with the Israeli company's *Singaporean competitor*;
- The Israeli company sends written requests to the American partner for an assurance that the confidentiality of the former's trade secrets are being preserved, but the American partner ignores those requests;
- The failure of the American partner to give assurance causes the Israeli partner (justifiably) to worry that its trade secrets have been disclosed;
- Even though the JV agreement contains an arbitration clause, before commencing the process of having an arbitrator appointed, the Israeli partner, naturally, wants to obtain ***injunctive*** relief[5] – ***both*** against its JV partner and against the Singaporean competitor. In other words, it wants to freeze the status quo.

Here are the strategic considerations that affect the ***drafting*** of an arbitration clause:

- With respect to the American JV partner, the Israeli company can easily obtain judicial jurisdiction in (at least) the US – but the only place where the Israeli company knows with certainty that it could obtain jurisdiction against both the JV partner ***and*** the Singaporean competitor is in ***Singapore***;
- Yet at the time of contracting, Singapore (like Peru, Finland, Nigeria, and most foreign countries) was a ***distant thought*** in the mind of the lawyer who drafted the JV agreement for the Israeli partner. At that stage, almost no such lawyer would invest

[5] The issue of whether an arbitrator may grant an injunction (and against whom) is ***beyond*** the scope of this article.

the time/resources to assure him/herself that, notwithstanding the ***broad*** arbitration clause, a Singaporean court would exercise jurisdiction to grant an injunction against both the American JV partner *and* the Singaporean competitor.

These considerations demonstrate the potential conflict between a broad arbitration clause and the desire for flexibility to seek nonmonetary relief *wherever* the need arises.

But that potential conflict does ***not*** mean that a broad arbitration clause is a nonstarter. Rather, the problem can almost always be resolved by the use of a "*carve-out*" in the arbitration clause.

A "carve-out" is a clause that ***excludes*** certain types of proceedings from the scope of the arbitration clause. The primary purpose of a carve-out is to make sure that the intention of the parties is clear – namely, that applications for "*equitable relief*" (an Anglo-American term that includes injunctions, orders of attachment or specific performance, or other kinds of relief sought in a court of equity) – may be heard by a court ***anywhere in the world*** where jurisdiction would otherwise be appropriate.

A carve-out is usually incorporated at the *beginning* of the arbitration clause:

> "***Except with respect to motions or applications for equitable relief***, any and all disputes or claims arising under, concerning, or relating to this agreement will be resolved by arbitration . . ."

In Israel and in most other common law jurisdictions, the existence of an arbitration clause is usually ***not*** an obstacle to having a court grant equitable relief – even when the arbitration agreement is silent on that topic. Therefore, in the purely domestic context, a carve-out in an arbitration agreement is usually *not* necessary.

However, counsel never knows in what country the client will need to file a motion for a temporary injunction to prevent a contracting party from misusing confidential information or infringing intellectual property.

The last thing that the lawyer who drafted the agreement wants to hear is that a court in a foreign country refuses to consider the client's application for temporary relief because of the arbitration clause that the lawyer drafted. Therefore, a carve-out is a ***must*** in almost any arbitration clause in an international agreement.

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