ISRAEL

Zvi Nixon

Lauren Sobel

E. Landau Law Offices

To: Recognition and Enforcement of Awards Subcommittee
IBA Arbitration Committee

From: Zvi Nixon and Lauren Sobel, E. Landau Law Offices, Jerusalem and Tel Aviv

Date: 1 July 2015

Re: Public policy as interpreted and applied by the Israeli courts in relation to the recognition and enforcement of foreign arbitral awards in Israel

1. Israeli courts have generally not been receptive to petitions to apply the public policy exception of Article V(2)(b) to the recognition and enforcement[1] of foreign arbitral awards in Israel.

2. This reluctance is grounded primarily in the longstanding importance Israeli courts have attached to the enforcement of arbitral awards, both local and foreign. This principle is so central to Israeli jurisprudence that, as stated by the Jerusalem District Court, "[t]here is no need to waste words on the judicial policy that instructs us to respect arbitral awards…all the more so foreign arbitral awards settling globe-crossing disputes in the era of the global economy."[2]

3. As a result, Israeli courts have tended to apply the grounds for denying the recognition and enforcement of foreign arbitral awards both narrowly and judiciously.

4. Recognition and enforcement of foreign arbitral awards in Israel is governed by Article 29A of the Arbitration Law. Article 29A establishes the principle that the recognition and enforcement of foreign arbitral awards or their setting aside by Israeli courts are subject to the provisions of the relevant international convention to which Israel has acceded, such that requests must be examined and determined in

[1] The applicable law, the Arbitration Law, 1968, does not distinguish between the recognition and enforcement of arbitral awards but uses the term "*ishur*", which mostly closely translates as "to confirm" or perhaps "to affirm".
[2] OM (J-M) *Atura Industries Ltd. v Mirabu Chemical Industries Ltd.*, published in electronic database, 13 March 2008, p. 5.

relations to those conventions. The Israeli courts have interpreted Article 29A as mandating that when the award whose enforcement is requested is subject to the New York Convention, the Convention's provisions are to govern exclusively.

5. Where the New York Convention applies and enforcement is objected to on the grounds that it would be contrary to the public policy exception in Article V(2)(b), Israeli courts have determined the interpretation of domestic public policy must also take into account the international nature of the dispute and the broader considerations of international public policy. Thus, in a 2004 case, the District Court stated that international public policy supported the recognition and enforcement of international arbitral awards.[3] This international public policy, it continued, is the product of the development of economic and trade relations between citisens of different countries and the subsequent need to base these relations on the broadest possible common denominator.[4] Indeed, as will be seen below, Israeli courts have embraced the position that encouraging the enforcement and recognition of awards issued by foreign tribunals is itself part of both international and Israeli public policy.[5]

6. The definition of public policy most often relied upon for questions relating to enforcement and recognition of arbitral awards is the same definition used by the courts to define domestic public policy. Public policy is thus defined as follows:

> "those central and vital values, interests and principles that a given society at a given time wishes to maintain, protect and foster. These are the foundations of the Israeli nation, spirit, society, and market… 'public policy' is the fortress used by a given society at a given point in time to defend its core values from arrangements (normative and physical) that seek to harm it."[6]

---

[3] OM (J-M) 2180/03 *TMR Energy Limited v. The State Property Fund of Ukraine*, published in electronic database, 28 October 2004, p. 4; cited in *Atura Industries Ltd. v. Mirabu Chemical Industries Ltd.*, published in electronic database, 13 March 2008, p. 5.

[4] ibid.

[5] OM (J-M) 6203/07 *Ze'evi Holdings Ltd. (in liquidation) v. The Republic of Bulgaria*, published in electronic database, 13 January 2009

[6] OM (TA) 12254-11-08 *Vuance Ltd. (formerly, Supercom Ltd.) v. The Department of Resources Supply of the Ministry of Internal Affairs of Ukraine*, published in electronic database, 15 April 2012, p. 28, citing

The Israeli courts apply these principles to determine the meaning of public policy based on the world view particular to the social framework in which the courts operate.[7]

7. The interplay between domestic and international public policy considerations may be seen in court decisions that foreign laws that are contrary to Israeli law are not necessarily offensive to its public policy, but only those that if given effect "would cause real damage to the public order according to which we live, and only where the foreign law is contrary to the Israeli public's sense of justice and morality."[8] These cases exist, the Israeli courts state, but they are the exceptional cases, not the norm.[9]

8. Thus, as in the case of domestic challenges to arbitral awards, the Israeli courts are very reluctant to accede to requests to refuse recognition and enforcement of foreign arbitral awards on public policy grounds, and such refusal has been fully granted only in one case.

9. This sole refusal was in connection with a fact pattern that produced awards that "flagrantly breached the most basic norms of law and justice"[10]. Indeed, the facts of this case were so egregious as to lead the court not just to refuse to enforce either of the awards, but also to set one of them aside. In this case, the Department of Resources Supply of the Ukraine's Ministry of Internal Affairs had initiated and pursued arbitral proceeding with the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry ("ICAC") against an Israeli company that had provided it with certain services. From the testimony of the Austrian arbitrator appointed by the Israeli company, it appears that these proceedings were highly irregular from beginning to end.

HCJ 693/91 *Efrat v. The Supervisor of the Population Registry* PD 47(1), 749, 779-780 (1993), ,749 (1) .(1993) 779-780

[7] *Epis v. Medibar*, para. 12.

[8] ibid.

[9] ibid.

[10] OM 12254-11-08 *Vuance Ltd. (formerly, Supercom Ltd.) v. The Department of Resources Supply of the Ministry of Internal Affairs of Ukraine*, published in electronic database, 15 April 2012, p. 28.

10. The findings of the Israeli court, which were not challenged by the Ukrainian government body before the Israeli courts, showed the following:

- the President of the ICAC appointed the chair of the tribunal before the two party-appointed arbitrators had been given the opportunity to consult of the appointment of the panel's chair within the 30-day period mandated for such consultation under the ICAC rules;
- the chair appointed was a Ukrainian national, even though the ICAC rules stipulated that such an appointee be of a nationality other than that of the parties to the dispute;
- the first arbitral award handed down by this improperly constituted tribunal was not reasoned;
- the ICAC refused the Israeli defendant's request to receive a full set of the documents submitted by the state claimant or even to examine the file, including information relating to the payment by the state claimant of the arbitral fees;
- the two arbitrators who were Ukrainian nationals appeared to have no separate and independent judgement from that of the President of the ICAC;
- the President of ICAC repeatedly threatened the Austrian party-appointed arbitrator - first, threatening to publish compromising photos of this arbitrator in order to secure his cooperation in the arbitral process and later threatening his safety if he did not sign the first arbitral award;
- the President of the ICAC withheld and hid from the Israeli-appointed arbitrator parts of the arbitral file.

11. Given these facts, the Israeli court had no difficulty finding that this was one of the rare cases in which it was required to apply the concept of public policy to defend the core values, interests and principles of civilised society.[11] Indeed, the court declared that "it is inconceivable that the recognition and enforcement of a foreign arbitral award based on bias, threats to the life of an arbitrator, the egregious interference of outside parties in the arbitral hearings and the arbitrators' decisions, could be commensurate with the central and vital values, interest and principles of

[11] ibid, p. 28-29.

the State of Israel as a state founded on the rule of law." Needless to say, the foreign arbitral awards were not enforced or recognised in Israel.

12. The extreme facts of the above case highlight the view that refusal to enforce a foreign arbitral award due to a breach of public policy, must be based on an exceptional set of circumstances. In the ordinary course, Israeli courts have adopted the position that Israeli public policy is irrelevant where a reasoned award, based on the parties' contractual arrangements, is issued.[12]

13. Thus, where a dispute regarding the exercise of an option to purchase a factory located in Israel was referred by the parties to arbitral hearings in Zurich in accordance with the arbitration agreement, the District Court of Jerusalem did not accept a petition to deny enforcement on public policy grounds because the arbitrators may not have been informed of all the facts by the party seeking enforcement.[13]

14. Likewise, when asked to recognise and enforce the decision of an arbitral tribunal composed of eminent scholars of arbitration and contract law under the auspices of the Zurich Chamber of Commerce (ZCC), the Jerusalem District Court rejected all arguments that such recognition would be contrary to Israeli public policy. In this case, the public policy arguments related to a conflict between the party resisting enforcement and the arbitrators regarding their fees, which had been raised before and resolved by the ZCC while the arbitration proceedings themselves were being conducted and later (and unsuccessfully) before the Swiss federal tribunal in an attempt to have the arbitral decision set aside. The Israeli court declared that it would be entirely unreasonable for a court in Israel to decide that it was better placed than the Swiss federal tribunal to examine whether ZCC arbitral proceedings

[12] *Atura*, p. 8.
[13] *Atura*, p. 8. The court did, however, allow a stay of enforcement in order to allow the party objecting to enforcement to ask the arbitration tribunal to reconsider the disputed facts. When this party did not do so within the time allotted by the District Court, the court ultimately allowed for the recognition of the award.

conducted in Switzerland according to Swiss procedural rules had been properly conducted.[14]

15. The Tel Aviv District Court likewise refused to set aside an award issued following the Fast and Low Cost Arbitration (FALCA) of the London Maritime Arbitrators Association on public policy grounds.[15] In this case, the party against whom enforcement was sought argued that enforcement would amount to knowingly and incorrectly rewriting of bills of lading subject of the dispute, contrary to public policy. The District Court dismissed this argument, stating that "[t]his far-fetched interpretation of the award is baseless. This is nothing but a settlement of mutual damage claims. Thus, the groundwork for establishing a basis for the heavy burden of proving a breach of public policy has not been laid."[16]

16. A further example of the approach of Israeli courts in considering international public policy considerations may be seen in the decision of the District Court of Jerusalem in a 2009 case, *Zeevi Holdings Ltd. (in liquidation) v. The Republic of Bulgaria.*[17] The court was asked to deny a petition for recognition and enforcement of an arbitral award issued in Paris under the UNCITRAL rules. The argument presented to the court against enforcement was that since the parties had reached an unambiguous contractual agreement that "execution of an award against the seller may be conducted only in Bulgaria in accordance with the provision of Bulgarian law", recognition and enforcement in Israel would be contrary to Israeli public policy. The District Court found that "execution", the term used in the relevant contract, was not commensurate with either "recognition" or "enforcement", but refers only to the proceedings to be opened after an award is recognised or enforced. While stating that Article V(2)(b) of the New York Convention "narrows international public policy to the public policy of 'that country' in which

[14] OM (J-M) 2031/00 *Epis S.A. v. Medibar Ltd.*, published in electronic database, 23 November 2004, para. 19.
[15] RLA (TA) 0167/63/04 *Lehman Commodies SA. v. Chian Shipping Ltd.*, published in electronic database, 27 September 2004.
[16] ibid, p. 3.
[17] OM (J-M) 6203/07 *Ze'evi Holdings Ltd. (in liquidation) v. The Republic of Bulgaria*, published in electronic database, 13 January 2009.

recognition is sought", the District Court noted that both the Convention and case law encourage recognition and enforcement of foreign arbitral awards and concluded:

> "public policy benefits from the enforcement of approved arbitral awards. Enforcement is the crowning glory and the showcase of the judicial system. The setting of stumbling blocks in the way of enforcement of final judgments and arbitral awards is what harms public trust and the respect of the law."

17. It is noteworthy that virtually all the decisions cited above dealing with applications to reject enforcement on the ground of a breach of public policy are those of District Courts, which are the courts of original jurisdiction for claims of enforcement under the New York Convention. Appeal against such decisions is not as of right, but requires permission of the Israeli Supreme Court,[18] and in no case has the Supreme Court granted leave to appeal on the grounds that there was an arguable case that the public policy defence had been incorrectly rejected by the lower court.[19] The general policy of the Supreme Court in rejecting applications for leave to appeal is that appellate courts will review the decisions of the court of first instance regarding the enforcement or setting aside of arbitral decisions only in exceptional cases where the issue to be resolved is one of principle going beyond the interests of the parties to the dispute. The principle of extremely narrow appellate intervention, the Supreme Court stated, is of even greater force when the arbitral decision is an international one, given the public policy interest in conforming to international norms as embodied in the New York Convention.[20]

---

[18] CA 11322/04 *The State Property Fund of Ukraine v. TMR Energy Limited*, published in electronic database, 17 July 2005, para. 3.

[19] In one case, CA 1650/10 *Gad Chemicals Ltd. v. BIP Chemicals Ltd.*, the public policy defence was raised as part of a general claim that the defendant was not liable to participate in payment of an arbitral award by the claimant, under an arbitration between the claimant and a third party, because of conspiracy between the claimant and that third party. The Supreme Court noted that no evidence whatsoever had been provided to support the allegations and thus it had no need to even consider the public policy defence.

[20] *Lehman v. Chian*, p. 3.

Identification of the decisions	**Summary of the public policy argument**	**Substantive/ Procedural**	**Enforced/ Denied**
Vuance Ltd. v. The Department of Resources Supply of the Ministry of Internal Affairs of the Ukraine, District Court, Center (First Instance), 15 April 2012	The arbitral awards were issued by a tribunal improperly constituted according to the rules of the local arbitral institution, the only party-appointed arbitrator who was not a national of the state in which the award was rendered was blackmailed and had his life threatened by the president of the local arbitral institution, and parties external to the arbitration interfered in the arbitral proceedings and decision process.	Substantive	Denied
Zeevi Holdings Ltd. (in liquidation) v. The Republic of Bulgaria, District Court of Jerusalem (First Instance) 13 January 2009 Request for leave to appeal rejected 10 June 2009.	The arbitral agreement stipulated that "execution of an award against the seller may be conducted only in Bulgaria in accordance with the provision of Bulgarian law" so enforcement in Israel would breach the agreement.	Substantive	Enforced
Atura Industries Ltd. v. Mirabu Chemical Industries Ltd., District Court, Jerusalem (First Instance), 13 March 2008	The arbitral tribunal was not informed of and did not discuss changes to the ownership of one of the companies subject of the arbitration	Substantive	Enforced

Identification of the decisions	**Summary of the public policy argument**	**Substantive/ Procedural**	**Enforced/ Denied**
Epis v. Medibar, District Court Jerusalem (First Instance), 23 November 2004	The party objecting to enforcement had a dispute with arbitral tribunal (appointed by Zurich Chamber of Commerce) regarding the arbitrators' fees and the arbitrators subsequently refused to recuse themselves.	Substantive	Enforced
TMR Energy Limited v. The State Property Fund of Ukraine, District Court, Jerusalem (Court of First Instance) 28 October 2004	The tribunal, appointed under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, lacked jurisdiction.	Substantive	Enforced
Lehman Commodies SA. v. Chian Shipping Ltd,. District Court, Tel Aviv (First Instance), 27 September 2004 Request for leave to appeal rejected on 4 April 2004	The effective result of the arbitral award would be incorrect rewriting bills of lading.	Substantive	Enforced
FCF (J-M) 10060/03 *P.D. v. A.A.M* Family Court, Jerusalem, 28 December 2003	The arbitral decision was that the breach by the wife of a divorce agreement released the husband from his obligation to pay child support.	Substantive	Enforced

(*) The court ordered enforcement but granted a temporary stay (which expired and was not renewed) in order to enable the respondent to file an application to the arbitration tribunal for correction of the award on grounds that the court had refused to consider constituted a public policy defence.