

Busy courts endorse settlement and ADR

Dor Heskia and Amos Hacmun of Heskia-Hacmun Law Firm provide an overview of the civil and commercial litigation process in Israel

The main role of the courts in Israel is to settle disputes, so the parties' consent significantly impacts on the conduct of legal proceedings in civil and commercial matters. This is true for both the material and procedural aspects of the case. The Israeli legal system is based on the adversary principle. Generally, the court does not take the procedural initiative and does not independently seek arguments or evidence. The parties make the arguments before the court and petition for the appropriate remedies until the court renders its decision.

The courts consist of professional judges and registrars. The registrars are more involved in the technical issues and in issues of temporary remedies. There is no jury – the judges of the different instances issue the decisions. In certain matters, several judges preside over a case, always in odd numbers, and the final judgment is rendered in accordance with the majority opinion of the judges.

Legal proceedings are conducted in Hebrew and the parties' pleadings are submitted in Hebrew.

The court has a broad discretion to decide on technical and other matters that are not specifically covered by legislation, applying criteria such as reason, justice, efficiency, and policy. The court rulings are based on laws and the regulations as well as on the Supreme Court rulings and precedents.

The court has the right to interpret law. Often the linguistic limitations of the wording of the law gives way to an interpretation that is guided by the intended purpose of the law or the spirit of the law. Interpretations are subject to the basic laws, which preserve values such as freedom of speech, freedom of occupation, competition, protection of property and other human rights. Much importance is given to the good faith principle of the litigating parties in conducting the proceedings as well as in the material matters of the case.

The Israeli court system consists of sev-

eral major instances that differ by the subject of their authority and the subject matter, as follows:

The Magistrate Court, or the Court of Justice, has authority over claims valued up to NIS2.5 million (\$570,000) excluding real-estate ownership claims. This instance will also deal with matters that concern the possession and use of real estate and related matters, regardless of their value. The Court of Justice will also hear counterclaims that refer to the same matters or circumstances as the initial claim, regardless of their value. This court of instance is located in many cities all over Israel.

The District Court has the authority to hear appeals as to judgments and certain decisions made at the Court of Justice. Israel is divided into five judicial districts and each District Court is in charge of the appeals that concern the Magistrate Courts within the relevant district. In addition, the District Court has the authority over claims valued above NIS2.5 million and in matters that concern the ownership of real estate. The District Court has also the exclusive authority over claims in matters of intellectual property. The District Court further has a residuary authority, that is, it

has the authority over all matters that are not within the authority of a specific other instance. Based on a special set of laws, the District Court has the exclusive authority over matters concerning bankruptcy, corporate management and liquidations. District Court judgments as the first instance may be appealed to the Supreme Court of Israel in Jerusalem. Judgments of the District Court on appeals may be appealed to the Supreme Court only if special permission to appeal is granted.

The Labour Court has exclusive authority over disputes originating from employment relationships. This court differs from the other courts because public representatives of employee and employer organizations co-chair with the presiding judge. Labour Court judgments are appealed before the National Labour Court.

The Family Court of law deals with disputes within the family and inheritance matters. This court has the exclusive authority over these matters, including the enforcement of foreign judgments of such matters in Israel.

The Supreme Court is the highest instance for appeals in civil and commercial matters. This court acts further as the High Court for Justice in matters between civilians and state authorities. The Supreme Court and some of its landmark decisions have become well known outside of Israel, especially during the reign of the current president, Prof Aharon Barak.

Figures and statistics

The Israeli court system deals with an increasing caseload (see Table 1) and has an annual surplus of pending lawsuits. This

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Table 1

	2002		2003		2004	
	Cases opened	Cases closed	Cases opened	Cases closed	Cases opened	Cases closed
Tel-Aviv District Court	44,105	44,551	44,594	42,890	55,545	49,483
District courts – total	105,081	106,483	99,555	99,801	119,699	110,533
Magistrate courts – total	730,726	711,734	688,048	678,641	755,767	802,154

Source: Israeli Courts website

impacts the length of proceedings and the judges' workload. From a statistical point of view, Israel is one of the world's leading countries in terms of lawyer/population ratio, with one lawyer for every 200 to 300 persons. In 2004 the number of registered lawyers was over 30,000 serving a population of about 6.5 million.

This market situation has made the task of choosing the right lawyer a difficult one. It is advised to rely on reliable recommendations and verify the expertise in the specific area of law.

The litigation kick-off

The litigation clock starts ticking once the statement of claim is properly served to the defendant. Upon service, the defendant is under the duty to respond within the procedural timeframes, which are usually provided in the summons served together with the lawsuit. In absence of response, a default judgment can be obtained against the non-responding party.

Serving Israeli judicial documents

outside of Israel should be done in accordance with applicable international conventions (The Hague Convention on the Service Abroad of Judicial and Extrajudicial documents in civil or commercial matters) and the corresponding regulations. In practice, sometimes the procedural requirements under the conventions or corresponding regulations are not met. In such cases, without derogating from the right to be properly served, one can make a corresponding notice and the court may order that the service be repeated until it is done properly.

Before a default judgment is made, the court will have to be convinced that the lawsuit was properly served. From this point on, the results will be dictated by the parties' acts and omissions. In the absence of a response to service, a judgment may be issued *ex parte*.

Temporary injunctions

To secure the realization of a judgment or to preserve a current situation, temporary injunctions may be imposed in parallel to filing a lawsuit to the court. Such seizures,

or their substitutes, will remain in force until a judgment or other decision is given. The temporary remedies are subject to the general equity doctrines, such as good faith, waiver and delay, which may serve as grounds for rejection of petitions. The most common temporary injunctions are temporary seizure of assets and temporary restrictive orders.

The *temporary assets seizure* requires the petitioner to convince the court that there is enough *prima facie* evidence of the claim. The second criterion is to establish that not granting the temporary asset seizure would impose a difficulty on the execution of a future judgment. The temporary assets seizure can also be granted in

respect of property held by third parties. It can be in respect of money, goods, real estate or any other tangible asset or right. This remedy is often granted *ex parte*, as sometimes it is the most suitable way to put a hand on something. In such cases, the party subject to the asset seizure may petition for its

cancellation within a statutory period. The court will then summon the parties for a hearing before the court and the burden of proof is imposed on the original petitioner of the temporary asset seizure. The court will impose expenses on a petitioner that fails to prove the proceedings were taken in good faith.

When petitioned for a *temporary restrictive order* the court will examine whether the order is essential before the actual clarification of the claim. For this purpose the petitioning party will have to provide *prima facie* evidence to prove that they are entitled to the right for which they are petitioning a temporary restrictive order (that is, there is a good chance they will win the claim). The petitioning party must also show that, if the order will not be issued, they will suffer irreversible damage that cannot be compensated by monetary means. The guiding principle of the court is to refrain from changing a current situation, if the results of the change are irreversible. The court will also examine the balance of convenience in the given matter, between the discomfort

caused to the petitioner if the order is not issued and the discomfort caused to the respondent by issuing the temporary order.

When petitioning for a temporary remedy the burden of proof is on the petitioner. The petition has to be accompanied by an affidavit that supports the petition and confirms the facts described in it. The court will usually schedule a hearing for the petition and the respondent has the right to cross-examine the person that signed the affidavit.

Statement of defence and counterclaim

Upon proper service of a lawsuit, the defendant is under the obligation to file a statement of defence. This is a pleading document, in which the defendant responds to all of the plaintiff's arguments and provides the defence arguments and the counter version of the facts. Material documentation should be attached but, except for certain expedited proceedings, there is no requirement to file an affidavit that supports the facts included in the statement of defence.

In addition to the statement of defence, the defendant may also submit a counterclaim if they have a valid claim and wish it to be heard and decided in the same proceeding. The counterclaim is subject to the payment of court fees just as a normal claim and is independent of the outcome of the claim. If the claim is withdrawn or rejected the counterclaim will continue. The amount of the counterclaim is not limited, even if exceeding the authority of the court, and the court to which the original claim was filed will hear it.

Attending court hearings

In civil and commercial matters, testimonies are usually made in the form of written affidavits. Whenever an affidavit is submitted, the general rule is that it is not admissible as evidence unless the other party had the opportunity to cross-examine the person that provided the affidavit. There are certain exceptions of written petitions where the court is entitled to decide based on the written pleadings and affidavits alone. However, even in written petitions, if a hearing is scheduled, the parties have the right to cross-examine the person who provided the affidavit.

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the court and the lawyers, and courts usually show flexibility in determining time schedules. Nevertheless, a person can only be exempt from physical attendance at court if special circumstances justify the use of other means.

Settlement, mediation and arbitration

The courts prefer settlements between the parties in dispute, as their main goal is to settle the disputes. Before entering the long process of hearing a case from beginning to end, the court usually tries to find an efficient way to resolve the case. Several alternative dispute resolution proceedings are commonly used in Israel. All alternative paths require the parties' consent.

The first common way is to authorize the court to decide by way of settlement. In accordance with a special regulation of the civil procedure regulations, the parties may agree to authorize the court to issue a binding settlement decision.

Another common practice is to refer the parties to mediation or arbitration. Mediation proceedings have become common in Israel over the last few years. The principle is that the parties reach a mutual understanding and an agreed settlement

while the mediator has no authorization to render any binding decision. The mediation proceedings and the information disclosed in them are confidential to the court, which will only learn of a settlement agreement if an agreement was reached. The mediation proceeding differs from the arbitration proceeding in some aspects, as the arbitrator has the authority to issue a binding judgment.

Time and money

There are no legal limitations on the pricing of legal services in civil and commercial litigations. The parties are free to agree on hourly rates, fixed rates, or contingency arrangements and any combination thereof.

Besides the costs of the lawyers, the suing party also has to pay court fees. There are defined fees for specific remedies and in monetary matters the court fee is 2.5% of the amount claimed or the value of the lawsuit. The court fee is paid in two instalments: the first half at the opening of

the file, and the second half before the hearing of the evidence. To encourage settlements, in certain cases the court will refund part of the court fees when parties have reached a settlement. Additional expenses might be incurred for investigations, translations and other related matters.

While there are certain statutory time frames during the litigation, there is no overall time schedule for the completion of a litigation, which usually takes years. The court system has incentive to complete the litigation in a short time but the length of litigation can vary and is dependent on the extent of the case and the parties' conduct, as well as that of the judge.

The courts have the discretion to impose the legal cost of the litigation or of a specific procedure/petition on a party. The issue of costs is discretionary and is not related to the expenses incurred. In practice, the legal costs imposed on corpo-

rate disputes are higher than those imposed on private individuals, although in both cases they are usually lower than the actual expenses paid.

Appeals

In Israel, a party to litigation has the right to appeal a

judgment before a higher instance. In an interim court decision, an appeal can only be made with the court's permission. The facts of the case are established by the first instance and appeals deal only with matters of law. So the court that hears the appeal does not review factual findings. However, the appeal instance may also return the case to the previous instance with instructions, such as how to treat certain evidence or to allow a party to present or measure certain evidence. During the appeal proceedings, the court has the discretion to issue an order to delay the execution of the judgment or decision being appealed.

There are no appeals in arbitration proceedings and the only way to annul an arbitration judgment is by petitioning for its cancellation. The causes for cancellation are limited to a defined list of specific arguments.

Enforcement of judgments

When a party does not perform in accor-

dance with a valid judgment, enforcement proceedings may be issued. In Israel, enforcement proceedings are done through the enforcement chambers, which are part of the court system. The creditor will have to pay a fee to open a file and for every action taken against the debtor. These costs are automatically added to the debt of the debtor. This authority does not initiate action, rather, it acts upon the creditor's requests and actions. The question of collecting the money depends on the financial ability and strength of the debtor as well as their conduct in proceedings.

The remedies available for enforcement are seizure and liquidation of assets, including assets held by third parties, summoning the debtor for interrogation about their financial means, and physical arrest in certain cases. A further possibility for a creditor is to petition for the appointment of a receiver over some or all of the debtor's assets.

In appropriate cases, the creditor may also petition the District Court to initiate insolvency proceedings, liquidation in case of a company and bankruptcy in case of a private person.

Enforcement of a foreign judgment in Israel

To execute a foreign judgment in Israel the judgment must be validated for enforcement in Israel. A special law arranges this matter.

Upon the successful completion of the validation proceedings, the foreign judgment may be enforced as if rendered by an Israeli court.

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