
1. The Model Law

The Model Law was enacted in order to provide a basis for the purpose of harmonization and improvement of national laws concerning arbitration. Such law presents a specific legal point of view regarding international commercial arbitration. The Model Law covers all stages of the arbitration process proposing member States the core and important principles of international arbitration to be followed by the States.

Article 34 of the Model Law allows a specific mean of recourse against an arbitral award. Article 34 determines that the interference of the court shall be made by an application for setting aside the arbitral award.

According to Article 34 of the Model Law, the court's interference against an arbitral award shall be made only in accordance with the procedure and grounds specified in such Article.

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The core of this article was originally submitted as part of the LL.M. requirements - Chualongkorn University.
The grounds

Article 34 specifies the specific grounds for the setting aside of an arbitral award as follows:

(a) the applicant proves that:
   1. a party to the arbitration lacked certain capacity, or the arbitration agreement is not valid under the law of such agreement or the laws of the State;
   2. the applicant was not given a proper notice regarding the arbitrator's appointment or of the arbitral proceedings, or was unable to present his case;
   3. arbitral award which was not given in accordance with the terms and scope of the arbitration agreement (provided that such can be separated from the valid parts pf the award);
   4. composition of the arbitral tribunal or procedures was not in accordance with the agreement (unless such agreement was in conflict with cogent principles of the Model Law); or

(b) the court finds that:
   1. non-arbitrability of the dispute;
   2. the arbitral award is against the public policy of this State;

The procedure

Sub-Article 34(3) requires such application to be made within a period of three (3) months from obtaining the arbitral award (or three months from the tribunal's disposition of the request under Article 33 of the Model Law - "Correction and interpretation of award; additional award").

Security

Please note that Sub-Article 36(2) of the Model Law allows the court, on the application of the party claiming for recognition or enforcement of the award, to order the other party to provide an appropriate security.
Exception:
Article 34(3) of the Model Law determines that if the court finds it appropriate, and so requested by a party, it may suspend the application proceedings and give the arbitral tribunal the opportunity to resume the arbitral proceedings or perform any other action which shall eliminate the ground for setting aside.

- Please note that Article 36 of the Model Law prescribes almost the same grounds concerning a party's refusal for recognition or enforcement of an arbitral award. The said article deals with the "passive" way of a party which objects the other arbitral party's petition for recognition and enforcement of the arbitral award by court, by using a manner of defense in such judicial proceedings; unlike Article 34 of the Model Law, which represents the "active" way in which a party submits on his own initiative a petition for the setting aside of such arbitral award. According to the Explanatory Note of the Model Law\(^2\), there might be two practical differences between the grounds of Article 34 (Setting aside) and Article 36 (Refusal) of the Model Law: (i) first, shall be the interpretation of the Public Policy term that may vary from State to State (State of setting aside or State of enforcement); (ii) Second, the grounds for refusal are valid only in the State where the winning party asks for recognition and enforcement, while the setting aside of an award at the place it was made, prevents enforcement of that award in all other Member States by virtue of Article V(1)(c) of the N.Y. Convention\(^3\) and Article 36(1)(a)(v) of the Model Law.

- Please note that the N.Y. Convention does not mention the "active" alternative of a party that submits an application for setting aside out of his own initiative.

Besides the abovementioned, as described in the Explanatory Note\(^4\), it is possible that, if agreed by the parties, a party shall not be prevented from resorting to an arbitral tribunal of second instance.

The exclusive list of limited grounds for the purpose of setting aside an arbitral award is, as stated, essentially the same as the one prescribed on Sub-Article 36(1), which was taken from the N.Y. Convention, Article V.

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\(^2\) Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration [the "Explanatory Note"].
\(^3\) Convention on the recognition and enforcement of foreign arbitral awards. New York, 10th June, 1958 [the "N.Y. Convention"].
\(^4\) Section 7(a).
2. The Arbitration Act

2.1 General

Section 24 of the Arbitration Act deals with “setting aside” of an arbitral award.

Section 24 determines that the court\(^5\) may, upon request of a party, set aside an arbitral award; partially or as a whole, complete such award, amend it or return it to the arbitral tribunal.

The grounds

Section 24 further determines ten (10) specific grounds for the purpose of setting aside an arbitral award, to be as follows:

1. the arbitral award was not valid;
2. the arbitral award was granted by an arbitrator who was illegally appointed;
3. the arbitrator acted without an authority or beyond the scope of his authorities under the arbitration agreement;
4. a party was not given an appropriate opportunity to claim his claims or present his proofs;
5. the arbitrator did not rule in one of the matters handed to his ruling;
6. it was conditioned under the arbitration agreement that the arbitrator shall provide his explanations with respect to the arbitral award, but the arbitrator failed to do so;
7. it was conditioned under the arbitration agreement that the arbitrator shall rule in accordance with the law, but the arbitrator failed to do so;
8. the arbitral award was given after the expiration of the required period for such award;
9. the content of the arbitral award is against the public policy;
10. the existence of a ground of which a court would have canceled a final verdict without the possibility to appeal.

Unlike the Model Law (Article 36, which provides a separate opportunity for the purpose of "refusal" even if based on the same grounds of "setting aside"), Section 23(b) of the Arbitration Act determines that any claim for the refusal of recognition of

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\(^5\) Please note that the court shall be the competent District Court in accordance with the Israeli Civil Procedure Regulations - 1984, and the Israeli Arbitration Regulations - 1968.
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an arbitral award shall be made only in the manner of petition for setting aside such award (i.e. Section 24 of the Arbitration Act). This means that the "passive" opportunity in virtue of party's refusal for the recognition/enforcement of arbitral award does not exist under the Israeli legal system.

Exceptions

a. Section 26(a) of the Arbitration Act allows the court to reject an application for setting aside despite the existence of one of the grounds mentioned in Section 24, if the court holds the opinion that no distortion of justice was done.

b. Section 26(b) of the Arbitration Act determines that the court shall not make use of its discretion to set aside an arbitral award, if it is possible to set aside part of the arbitral award, complete it, amend it, or return it to the arbitrator. Such provision brings me to the conclusion that the possibility of setting aside an arbitral award shall be the last option to be executed by the court.

Section 27 of the Arbitration Act prescribes a period of forty five (45) days from the date of the arbitral award, for the submission of setting aside application (unlike Sub-Article 34(3) of the Model Law which sets a period of three (3) months). The court may extend such period for any special written grounds and any case of application for recognition of external arbitral award (an award that was given outside the State of Israel). Such period of time shall not apply for a setting aside application based on Sub-Section 24(1).

The Israeli Arbitration Regulations - 1968 [the "Regulations"] determine that any application for setting aside an arbitral award, shall be submitted as an inducement, specifying the exact ground of Section 24 for such purpose, along with an affidavit verifying the facts of such application.

According to the Regulations, the respondent to an application for the recognition of an arbitral award, is allowed to refuse to such application, in a way of submitting a setting aside application (in the manner mentioned above) within a period of 15 days.

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6 Invalidity of an arbitral award.
7 Regulation 9.
8 Regulation 10.
from the receipt of the application for recognition, and no later than the time schedule prescribed under Section 27 of the Arbitration Act.

Sub-Section 27(c) of the Arbitration Act determines that the court shall not consider an application for setting aside that was submitted after the arbitral award was recognized (except for the ground mentioned in Sub-Section 24(10)). The Arbitration Act uses a more active and specified language than the Model Law regarding this matter, clearly stating that the option for a party to ask for setting aside is impossible in such event.

Please note (as mentioned before) that according to the Arbitration Act, unlike Article 36 of the Model Law, the "passive" way of refusal does not actually exist, as the Arbitration Act only mentions the manner of a setting aside application - as determined in Sub-Section 23(b) of the Arbitration Act.

The courts have also ruled that "the law does not recognize and it does not intend to recognize the hybrid of any objection (to an arbitral award) which is not an application for the setting aside. Therefore, an objection shall not be heard, unless it is an application for the setting aside (of an arbitral award)".

Interim orders

Section 29 of the Arbitration Act allows the court to order the party whom the arbitral award was granted against, to provide an appropriate security, as well as implementing other interim orders of seizure, banning a party from departing the country [Please note that according to the Israeli Civil Procedure Regulations - 1984, the party requesting such interim orders, shall be usually required to deposit a certain security/guarantee in any case of damage caused by false application].

According to Section 28 of the Arbitration Act, once the court rejects an application for setting aside, it shall recognize the arbitral award, even if no party had submitted an “active” application for the arbitral award's recognition.

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9 District Court; Civil Case (Tel-Aviv) 426/75 Ram-Nof and others v. the estate of the late Tzvi Spektor blessed memory, P"m 35 (1) 463.
2.2 Courts' ruling

As mentioned above, the Arbitration Act specified ten (10) grounds for the purpose of setting aside an arbitral award.

The Israeli Supreme Court (the "Supreme Court") has ruled and emphasized in numerous cases, that those ten grounds are the exclusive and only grounds to be used in connection with setting aside an arbitration award.

- Please note that Section 30 of the Arbitration Act requires the arbitrator to act in loyalty towards the parties. In the event that the arbitrator embezzled the trust given to him, the affected party shall be entitled to the remedies given in any breach of a contract, in addition to any remedy under the Arbitration Act.

The establishment of arbitration

The Supreme Court, as the body who guides, interprets and adds substance to the laws, had expressed its positive opinion in numerous cases, emphasizing the great need for and the positive impact of the arbitration process.

According to the Supreme Court, the arbitration process serves important interests:

- **Public interest**: the legal policy and point of view (as stated in many rulings) is one that considerate arbitration as an effective and efficient tool for dispute resolutions outside the walls of the court. Such establishment eases the significant burden and workload from the courts and in the same time maintains the fundamental criteria of the public policy.

- **Personal and private interest**: it was the Supreme Court who ruled that the arbitration proceedings provide the parties a speedy and efficient proceeding for the settlement of their dispute. The parties can influence in a great deal on the shape of the arbitration content, the powers of the arbitrator and also the procedure of such proceedings. Such rights allow, in the opinion of the Supreme Court, a ruling without any restrictedness to the substantive law, legal procedures and evidence laws. The Proposal for Arbitration Act -
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1967, also mentioned that the establishment of arbitration "offers the citizens speedy solutions".10

In addition to the above mentioned interests, I would opine that another added value of the arbitration process is that it allows ruling in accordance with criteria of justice and fairness which are not necessary legal ones (i.e. considerations that a courts must consider). The court had also determined that the arbitration is a tool that achieves practical solutions to the dispute.11

Manner of courts' interference

The Supreme Court had expressed its opinion, that despite such advantages and great values to be found in the establishment of arbitration, a judicial supervision is yet required.

The judicial supervision aims to achieve a proper balance between a maximal independence of the parties and the arbitrator to shape the frame of the debate and ruling, and the need to "keep a judicial supervisory eye that will ensure the perfection of the process and the purity of the arbitration proceedings, as well as their execution in an effective procedural manner, and basing the arbitral award on criteria that correlate fundamental concepts of public policy"12 rather than conducting a substantial examination of the results of the arbitration process (except for the ground of Sub-Section 24(10) - public policy).13

It has been ruled that the arbitration is a "commercial tool, designed to allow a speedy and effective litigation between the parties".14

In order to achieve such goals, the arbitrator is given wide authorities, such as: non-rigidness to evidential laws, lack of need to explain the reasons for the arbitral award, a final and definite award (except for the 10 grounds).

For such reasons and policy mentioned above, it had been ruled that the Supreme Court’s basic point of the view is the one limiting the court's interference/recourse in

11 Civil Appeal 4886/00 Gross v. Keidar, Pad"i 57 (5) 933
12 Permitted Civil Appeal 3680/00 Aharon Gamlieli v. Magshimim, Pad"i 57 (6) 605.
13 Permitted Civil Appeal 113/87 Ayalon tracks company, Ltd. v. Yehuda Shtang & Sons, Ltd., Pad"i 45 (5) 511.
14 Permitted Civil Appeal 6130/98 A contractual company for the build of Jerusalem Tashd"am, Ltd., v. R.A.M. Engineers and constructors, Ltd., and Others, Padaor 99 (8) 220.
an arbitral award only to the ten (10) specific grounds of Section 24 of the Arbitration Act. Those ten grounds shall be interpreted in a very narrow, adjective literal and limited way.

The courts had ruled that a court's interference beyond those ten narrow grounds is violating the proper balance between the independence and free hand which the legislator asked to provide with the establishment of arbitration, and the public interest of narrow judicial supervision on the perfection of the arbitration proceedings. As explained above, such interference shall be limited and narrowed, due to the importance of the arbitration establishment and the important interests and policies achieved by it.

The courts "row towards the finiteness of an arbitral award, in order for the arbitration to be considered as a substitute to the court and not as a gateway to it".

Not only that the courts' interference by setting aside an arbitral award is limited to ten limited grounds in particular, but the remedy of setting aside an arbitral award in general is an "exceptional and significant step to be taken only on rare occasions, when there is a stable ground for such action".

The justification for such step must arise clearly and unequivocally from the evidences.

By interfering in an arbitral award, the court does not function as a court of appeal. Its authority is limited to the above mentioned ten grounds only and it shall not examine whether the arbitrator was legally right or wrong in his ruling, whether the arbitrator was linked to the substantial law and was mistaken in its implementation and of course if the arbitrator was not linked to the law at all.

The reason for such lack of interference is because the ground of "error of the award" is no longer a valid ground for setting aside of an arbitral award;

The Israeli courts have implemented the "error of the award" ground, that was not mentioned under the previous Arbitration Ordinance (which was almost an exact copy

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15 The grounds for setting aside an arbitral award.
16 See footnote 12.
17 Civil Appeal 347/65 Securities and investment, Ltd. V. Yishnomat, the Israeli company for nomistiques, antiques and art, Ltd., Pad"i 19 (4) 468.
18 See footnote 12.
19 Civil Appeal 785/82 Itamar and Yehudit Grestel v. Hefetz village holdings, Pad"i 37 (3) 292.
20 Civil Appeal 594/80 Hertzel Elia v. Hasne, an Israeli insurance company Ltd., Pad"i 36 (3) 543.
of the British Arbitration Act - 1889), but rather taken from the British Common Law system which considered such right of a court to set aside an arbitral award for the reason of "error of the award" as the natural basic right of the court. Although this specific ground existed under the Israeli legal system (at the times of the Arbitration Ordinance until the legislation of the Arbitration Act in 1968), the Israeli courts had **narrowed and limited** the use of such ground only to the events of a wrong legal presumption that was found out in the arbitral award; meaning an **obvious mistake, that shall not require special efforts** (as examining the content of the arbitral award: claims and facts of such).

The legislator had changed such perception on 1968, when the Arbitration Law was enacted, including the ten specific grounds of Section 24. The Supreme Court had interpreted such Act, determining that the legislator's intention is to use only those ten **specific grounds** as the **exclusive grounds** for the setting aside of an arbitral award\(^\text{21}\).

The Proposal for Arbitration Act explains that one of the main purposes of the Arbitration Act is to change the previous situation (i.e. Arbitration Ordinance and Courts' ruling) in which more applications were made to the courts, which interfered in arbitral awards in a greater manner\(^\text{22}\). Therefore, "the proposed Act abstains from determining general grounds, such as "an un-appropriate behavior of the arbitrator" or "error of the award"…and prefers specifying the exact grounds while limiting those\(^\text{23}\)."

Another reason for such outlook is the fact that the **parties have agreed in advance** to accept and follow the arbitral award even **if such shall be mistaken** and even if one party or another will not be satisfied with such award\(^\text{24}\).

"When the parties agree to hand their disputes into arbitration, they accept the judgment of the arbitrator, his understanding of the law and the facts, and they can not complain that those (understanding of law and facts) are mistaken. Even if the arbitrator was wrong regarding rule or judgment, it can not lead to the cancellation of the arbitrator's ruling, since the parties have accepted him for such purpose\(^\text{25}\)", unless as shall be further detailed.

\(^{21}\) Civil Appeal 209/70 **Yanushi Chabibale v. The insurance and pension fund of the construction builders**, Pad"i 25 (1) 108.

\(^{22}\) See footnote 9. See also footnote 20.

\(^{23}\) Permitted Civil Appeal 2237/03 **Efraim Shuali construction and investments, Ltd. v. Tel-Mond local municipality**, Padaor 05 (1) 74 (See also footnote 9).

\(^{24}\) See footnotes 13 and 19.

\(^{25}\) Civil Appeal 388/81 **Timorim - a cooperative settlement for agricultural settlement, Ltd. v. Weitzman Soi Cahana nurseries and others**, Pad"i 36 (4) 253.
In such ruling, the Supreme Court had expressed its opinion that the **interest of execution of an arbitral award is preferred** over the interest of correction of arbitrator's mistakes\(^{26}\).

The purpose is to strengthen the finiteness of an arbitral award and to make the establishment of arbitration as an effective and speedy tool for dispute resolution\(^{27}\). Therefore, as already mentioned above, based on such ten grounds, the court shall examine mainly the **perfection of the arbitration proceedings** in accordance with the parties' agreement, **rather than the content** of the arbitral award (except for the specific ground of “public policy” - Sub-Section 24(9) of the Arbitration Act)\(^{28}\).

Furthermore, even when the parties have conditioned that the arbitrator must rule in accordance with substantial law (as mentioned in **Section 24(7)** of the Arbitration Act), and the arbitrator was wrong with such law's interpretation or execution, the Supreme Court had ruled that such mistake shall not be considered as a deviation beyond the arbitrator's authorities, unless the arbitrator ignored completely the substantial law and did not rule in accordance with it (as the ground of Sub-Section 24(7)). "Whoever has an authority is not considered as someone who acted beyond his authorities just because he wrongly executed such authority\(^{29}\)"..."the term authority has many meanings, and we must interpret such term in a manner that shall fit the tendency of executing an arbitral award\(^{30}\).

Since the parties themselves have appointed the arbitrator, there is a **presumption** that such arbitrator's acts are valid\(^{31}\), except (as described above) in the case that the parties had agreed that the arbitrator shall rule according to the substantial law (Sub-Section 24(7)), and the arbitrator ignored completely such law and did not rule in accordance to it\(^{32}\).

To conclude, the tendency of the court shall be the one preferring the execution of the arbitral award on such award's cancellation/setting aside, and as a result interpret the

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\(^{26}\) See footnote 13.  
\(^{27}\) Permitted Civil Appeal 5991/02 Ofra and Amos Gvirtzman v. Ruth Farid and Itzhak Shoval, Padaor 04 (19), 13. See also footnote 21.  
\(^{28}\) See footnote 13.  
\(^{29}\) See footnote 13.  
\(^{30}\) Civil Appeal 823/87 Denya Sikus, a construction company, Ltd. v. S.A. Ringel, Ltd., Pad"i 42 (4) 605.  
\(^{31}\) Civil Appeal 318/85 Dan Cochavi v. Gazit consilium, investment and development, Ltd. and others, Pad"i 42 (3) 365.  
\(^{32}\) See footnotes 13, 30, 31.
arbitration agreement in a **wide manner**\(^{33}\). The party claiming for the setting aside of an arbitrator award shall bear a heavy burden of persuasion\(^{34}\).

- Such case is different than the court or arbitrator's wide discretion to correct errors in **computation, any clerical or typographical errors** or any errors of similar nature\(^{35}\) according to Article 33 of the Model Law and Section 22 of the Arbitration Act (which is more detailed and also allows the court to correct some of those errors even when a party did not request such correction from the arbitrator first).

**What shall the court examine [based on the ten grounds - effective procedural manner and perfection of the proceedings]**\(^{36}\)?

The court shall basically examine fundamental issues dealing with the arbitration proceedings' perfection, such as:

a) the existence of a valid arbitration agreement;
b) a legally arbitrator's appointment;
c) whether the arbitral award did not deviate beyond the scope of such arbitration agreement;
d) natural justice rules;
e) criteria of public policy;
f) the extent of the arbitrator's responsibility for any failure or omission\(^{37}\).

I would like to mention that despite the clear and obvious policy and tendency not to open and interfere with an arbitral award, I have found a **minority opinion** of one of the Supreme Court's judges\(^{38}\), which raised the question whether this is not the time to re-consider again several provisions of the Arbitration Act, for the purpose of strengthening the establishment of arbitration, increasing the public’s trust and feeling of justice. The honorable Judge Rubinstein expressed his concern that the almost impossible lack of appeal over an arbitral award might **deter** litigants from using arbitration proceedings.

\(^{33}\) See footnotes 30 and 17.
\(^{34}\) See footnote 31.
\(^{35}\) See footnote 25.
\(^{36}\) See footnote 12.
\(^{37}\) See footnote 19.
\(^{38}\) See footnote 23. Honorable Judge Elyakim Rubinstein.
It might be needed, in his opinion, "to balance between the principle of an independence arbitral award and the ambition to achieve the correct result which the arbitrator indeed achieved, but was not actually obtained due to a minor mistake". Judge Rubinstein raised several possible solutions:

- **An appeal tribunal** shall be determined in advance in the arbitration agreement [for example: see the resolution of the Israeli Institute for Commercial Arbitration (established by the Chambers of Commerce), dated September 28, 2004].

- **A broader interpretation** to be made by the courts in cases of real injustice; According to Judge Rubinstein, the principle of *justice* shall prevail in such circumstance over the principle of the parties' freedom and risk by knowing the current legal status when entering into the arbitration proceedings. Such interpretation should be taken especially with the grounds of Sub-Sections 24 (3) “arbitrator's act beyond his authorities”; (4) “lack of appropriate opportunity to claim or present party's proofs”; (9) “arbitral award against public policy”.

- **A narrow and limited interpretation** and use of the exemption of Sub-Section 26(a) of the Arbitration Act, which allows the court not to set aside an arbitral award even when one of the ten grounds has been fulfilled - in the event that no distortion of justice has occurred. Justice Rubinstein brings as example the U.K. Arbitration Act - 1996, which includes the grounds of "Serious irregularity", "uncertainty or ambiguity as to the effect of the award", or when the decision of the tribunal on the question is "obviously wrong", or when the question is one of "general public importance and the decision of the tribunal is at least open to serious doubt".

Such possible solutions, according to Judge Rubinstein, might be exercised by adding the appropriate appeal mechanisms into the arbitration agreement, by the courts' interpretation and also by the appropriate legislation.

According to such minority opinion, despite the fact that the parties have chosen to bind their dispute into arbitration procedure, the lack of flexibility towards an appeal

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39 Rules of the Israeli Institute of Commercial Arbitration (established by the Chambers of Commerce) - Rule 11. www.borerut.com

40 Civil Appeal 376/46 *Rozenbaum v. Rozenbaum*, Pad"i 2 235: "Between stability and justice - justice prevails".
options and interference of courts with the arbitral award, shall deter the parties from approaching into arbitration proceedings, and therefore shall fail the desired legal and judicial policy of strengthening and encouraging the arbitration process.

- In addition, Judge Rubinstein notes that unlike the process of arbitration, a consideration of appeal exists with respect to the procedure of compromise\(^{41}\).

The validity of an arbitration agreement/clause when the whole agreement between the parties is not valid

Article 16(1) of the Model Law\(^ {42}\) determines that for the purpose of arbitral tribunal's ruling on the jurisdiction, existence or validity of an arbitration agreement, the arbitration clause of the parties' contract, "shall be treated as independence from the other terms of the contract. A decision of the arbitral award that the contract is null and void shall not entail ipso jure\(^ {43}\) the invalidity of the arbitration clause".

The Model Law emphasizes the separability and autonomy of the arbitration clause from the rest of the contract\(^ {44}\).

The Arbitration Act is less firm in its spirit regarding the autonomy and separability of an arbitration clause;
Section 3 of the Arbitration Act determines that an arbitration agreement shall not be valid in case that it involves a matter that can not be a subject to an agreement between the parties.
The Supreme Court had faced that issue while dealing with the invalidity of a restrictive agreement\(^ {45}\).

The court prescribed several examples of Section 3:

- Arbitration clause of an agreement that by its nature must be litigated in judicial tribunals or other special tribunals, such as:
  - criminal matters;

\(^{41}\) Israeli Compensation Act for car accidents injured - 1975: Sub-Section 4(c); Israeli Courts Act - 1984: Sub-Section 79A(A).
\(^{42}\) "Competence of arbitral tribunal to rule on its jurisdiction".
\(^{44}\) See footnote 2.
\(^{45}\) Permitted Civil Appeal 6233/02 Extel, Ltd. v. Kalma Y. industry, marketing of aluminum, glass and affixing, and others, Padaor 04 (1) 471.
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- special matters with respect to family law regarding marriage and divorce;
- disputes that effect 3rd parties.

The Supreme Court had ruled that:

In general: the fact that an agreement is void (due to it being as a restrictive agreement), does not necessary mean that its arbitration clause is void as well. The Court based its decision on Section 19 of the Israeli Contracts Law - 1973\(^{46}\), which states that even if a contract is void due to its illegality, it is possible to separate between the void parts and the valid ones. The Supreme Courts further determined that even when such separation is impossible, the contract may nevertheless be "revived", partially or as a whole, by using Section 31 of the Contracts Law which determines that the court may oblige the other party in committing the opposing obligation if the court finds it justified.

In particular: the invalidity of an agreement does not invalid by itself the arbitration clause of such agreement. It shall be examined how and why the agreement became invalid. "Such approach sees the arbitration clause as an inseparable part of the agreement, while the arbitration clause shall not become invalid despite the invalidity of the agreement. The invalidity that was attached to the agreement does not stain the arbitration clause".

"The arbitration note is a mechanism for the execution of rights resulting from the deal, the subject of the agreement, and therefore there is no necessity; neither legally nor logically, that a defect in the agreement shall invalid the arbitration note as well"\(^{47}\).

The court further ruled that since a court's examination of the invalidity claim "before the deed" is extremely difficult and its disadvantages shadow its advantages - in circumstances when this it is not so obvious that a matter can not be used as an agreement between the parties\(^{48}\), then it is appropriate to execute the arbitration clause.

\(^{46}\) The Contracts Law (general part) - 1973, Laws Book 5733 118 [the "Contracts Law"].

\(^{47}\) See footnote 45, and also Request Permitted Appeal 158/77 Samuel Segal v. Nafit investment and development, Ltd., Pad'i 31 (3) 389.

\(^{48}\) Section 3 of the Arbitration Act.
An "after the deed" examination shall be made by the court by using the ten grounds of Section 24 of the Arbitration Act, especially Sub-Section 24(9) that deals with public policy.

The provision of Section 3 of the Arbitration Act shall apply in the events of illegal arbitration agreement when the invalidity is clear and visible, as "Mala per se", and therefore no further examination regarding the question of invalidity is required. It has determined in the Supreme Court's rulings that the "court shall protect the establishment of arbitration as much as it can against claims of invalidity"… "Even when an illegal agreement was executed, its arbitration clause shall not be considered as invalid - if the agreement can be authorized (such as - obtaining a license when such is needed), or when it is possible to separate such agreement between its legal and illegal parts, by using the "blue pen" principle. For this reason it had been ruled that even a commercial agreement with a financial nature that is infected with illegality, might give a litigant legal claims which are separated from such agreement; such as "proprietary" or "enrichment without a trial" laws, and the court might recognize such claims. Another example is the Supreme Court's ruling that "only purely criminal matters can not be handled to arbitration"… while in the event that "any act may be the subject of a criminal case as well as a civil one, there is no prevention that the civil part shall be handled to the arbitrator's ruling".

**Distortion of justice**

Another main factor do be taken into consideration with respect to the issue of setting aside are the exceptions for the court's recourse.

As mentioned above, according to Sub-Section 26(a), the court shall not set aside an arbitral award, in the event that no distortion of justice was done. Such exception leads to the same policy of a minimal interference by the court in an arbitral award. A policy and approach that emphasize the need and the positive impact of the arbitration process along with the important principle of finiteness of an arbitral award.
The principle of Sub-Section 26(a) is a "super-principle" which applies to all of the ten grounds for setting aside an arbitral award.\(^55\)

According to the wording of Sub-Section 26(a), "the court may reject an application for setting aside, despite the existence of one of the grounds of Section 24". The Supreme Court had noted that despite the word "may", the courts must examine, before deciding on setting aside an arbitral award, whether a distortion of justice had occurred. If a distortion of justice had not occurred - the court shall not set aside the arbitral award.\(^56\)

1) The issue of distortion of justice usually refers to the arbitration process itself. It has been ruled that in a case of "a party who:
   a. performed in front of the arbitral tribunal;
   b. claimed his claims; and
   c. presented his evidences.
   The tendency shall be not to rule that a distortion of justice was caused to such party even if he has a known ground for setting aside.\(^57\)

In another event, the Supreme Court ruled that the fact that the arbitrator did not write protocols of his meetings is not one of the ten grounds of Section 24, but even if it was, the lack of such protocols does not consider as a distortion of justice and therefore the court shall not set aside the arbitral award.\(^58\)

2) In some cases, a distortion of justice might refer to the result of the arbitration process.
   Such was the case of an arbitrator who ruled a certain sum of money and also interest regarding that monetary debt between the parties. The arbitrator decided on the required interest according to a new law that became valid between the arbitrator's decision (on the exact sum of money) and his final award (which added the interest as well). In that case, the parties expressly appointed the arbitrator to rule on the matter of the interest by using another law. The arbitration agreement was very thorough and precise by setting the different laws for each subject to be ruled by the arbitrator. As a consequence, the amount of money to be paid as interest was almost double than the sum of

\(^55\) Civil Appeal 816/88 The regional municipality Maale-Yosef v. Tishra, Ltd., Pad"i 45 (3) 124.
\(^56\) See footnote 31.
\(^57\) Civil Appeal D.D.D. construction, dirt operations and investments, Ltd. v. the regional municipality Mate Yehuda, Pad"i 45 (3) 337.
\(^58\) Civil Appeal 584/72 Mordechai Diplovich v. Nathan Kaplan, Pad"i 27 (2) 705.
\(^59\) See footnote 57.
money consisting the debt itself. The Appellant claimed that no distortion of justice was done, and therefore the court should not set aside the arbitral award, even when the arbitrator had acted beyond the scope his authorities and also did not rule in accordance with a certain law.

The Supreme Court rejected the exception of lack of distortion of justice by ruling that the arbitrator's act had indeed caused the Respondent a distortion of justice and amended the arbitral award.

The courts have questioned the definition of "Distortion of justice", and eventually it was the Supreme Court who stated that it "doubts if specific and exact rules may be determined regarding such definition...sometimes the distortion is originated in a twisted, non-reasonable, discriminating and injustice decision, and sometimes the distortion of justice is an affliction which spreads not only to the award, but to the whole building of arbitration from the foundation to the roof."60

It is also been noted that "the more the ground for setting aside is lighter; the more it is needed to question whether a distortion of justice took place. The more the ground for setting aside is severe (as an arbitral award against the public policy, or a claim of fraud, or when the arbitral award was given after the expiry of the required period) - then the distortion of justice becomes so clear until it shall be identical to a ground for setting aside an arbitral award"61.

**The correlation between Sub-Section 24(3) and Sub-Section 24(7)**

Sub-Section 24(3) deals with an arbitrator who acted without an authority or beyond the scope of his authorities. Sub-Section 24(7) describes a situation in which the arbitrator failed to rule in accordance with the laws the parties conditioned in their arbitration agreement.

As already discussed in this research paper, the Supreme Court had ruled that "even if the arbitrator was wrong with respect to the law or judgment, it shall not set aside his arbitral award. Only when the arbitrator completely ignored the substantial law and did not rule in accordance with it, despite such condition in the arbitration agreement that he must do so, then it shall be a ground for setting aside the arbitral award according to Sub-Section 24(7)"62.

60 Civil Case (District of Tel-Aviv) 3251/72 Davidovich and others v. Vaaknin. P"m 5734 (3) 13 - was quoted by the Supreme Court in footnote 31.
61 See Footnote 60.
62 See footnote 13, 31. Please note pages num. 10-11 of this research paper.
It had been also ruled that if the arbitrator failed and was wrong in performing in accordance with the law - unlike a case of an arbitrator who did not mean to rule in accordance with the law in the first place, and by that did not follow the intention of the parties, then there is no ground for setting aside the arbitral award.

Sub-Section 24(7) emphasizes the acts of the arbitrator, rather than the results of those acts. "The emphasis is on the deed (whether conditioned or not) and not on the fruits of such deed".

As already mentioned above, one of the main reasons for such approach is that the parties have agreed in advance to accept and follow the arbitral award even if such shall be mistaken and even if one party or another will not be satisfied with such award.

Of course, the interference of the court shall not be required when a party claims that the arbitrator did not act in accordance with any substantial law (based on Sub-Section 24(7) of the Arbitration Act) when the parties themselves have agreed to exempt the arbitrator from any substantial law, procedural and evidential laws.

Sub-Section 24(3) is a general section dealing with an action without any authority or beyond the scope of authorities - unlike Subsection 24(7) which deals with a specific matter of action without or beyond the arbitrator's authority (arbitrator's ruling not in accordance with the law, when the parties had conditioned such requirement in the arbitration agreement), and therefore Sub-Section 24(7) is actually a special reference to the matters of Sub-Section 24(3).

Conclusion:

- Whenever the case is based on the arbitrator's act without or beyond his authorities, only with respect to the substantial law which the parties had agreed to - then Sub-Section 24(7) shall be relevant.
- In all other situations of arbitrator's act without or beyond his authorities - Sub-Section 24(3) shall apply.

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63 Opening Motion (Tel-Aviv) 1271/77 Soleb - furniture and wood factories of Solel Bone, Ltd. v. Eduard Tal, P'm 5738 (1) 417, as was quoted in footnote 13.
64 Civil Case (Tel-Aviv) 1334/80 - was not published, as was quoted in footnote 13.
66 See footnote 12.
67 See footnotes 13, 21.