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Legal Origin and Court Involvement: A U.S.–Israeli Comparison of Commercial Arbitration

*Annabelle Attias**

I. INTRODUCTION

Arbitration has proven to be an effective way to resolve disputes “privately, promptly, and economically,” both today and throughout documented history.¹ Arbitration is a private process in which disputing parties agree that a neutral individual, an arbitrator, will “make a decision about the dispute after receiving evidence and hearing arguments.”² Parties voluntarily submit their dispute to an arbitrator, typically via a contractual provision, to obtain an award.³ Parties often pursue arbitration over litigation because arbitration offers decreased costs, expedited resolution time, confidentiality, personalized procedural rules, the ability to choose applicable law, and the benefit of an industry expert decision maker, all while still producing a final and binding award.⁴ Parties’ specific rights vary by country, which is likely the result of difference in origin of the domestic body of law.

In both the U.S. and Israel, the legislatures—recognizing the benefits of arbitration for parties and over-burdened court systems—enacted arbitration acts to allow parties to bypass the courtroom and, instead, agree to arbitrate.⁵ It follows that courts in the U.S. and in Israel both impose high thresholds for the parties to overcome when seeking judicial review or appeal based on the merits of an arbitrated case.⁶ In the United States, the Supreme Court has repeatedly protected arbitrators’ vast power to decide awards on the merits, permitting only *judicial* review of the arbitral procedure.⁷ In Israel, however, although judicial review is

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1. *Commercial Arbitration Rules & Mediation Procedures*, A.B.A. 7 (Oct. 1, 2013), https://adr.org/sites/default/files/CommercialRules_Web.pdf.

2. *Arbitration*, A.B.A. (Oct. 11, 2018), https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/.

3. *Commercial Arbitration Rules & Mediation Procedures*, *supra* note 1.

4. Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, A.B.A. J. (Mar. 5, 2012), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

5. *Id.*

6. See 9 U.S.C. §§ 1–16 (1947); בוררות וגישור – בתי משפט וסדרי דין – תשכ"ח-1968. חוק הבוררות, תשכ"ח-1968 (amended Nov. 28, 2018) (Isr.) (Arbitration Law, 728–1968, Beit Mishpat and Orders of Law on Arbitration and Mediation) [hereinafter Israeli Arbitration Act].

7. “A party seeking relief under § 10(a)(4) bears a heavy burden. ‘It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error.’ Because the parties ‘bargained for the arbitrator’s construction of their agreement,’ an arbitral decision ‘even arguably construing or applying the contract’ must stand, regardless of a court’s view of its (de)merits. Thus, the sole question on judicial review is whether the arbitrator interpreted the parties’ contract, not whether he construed it correctly.”

similar to that of U.S. courts, the arbitration statute itself provides an appendix for the parties to use if they want to maintain their right to appeal on the merits within the arbitral forum.⁸ Despite this difference in statutory involvement in the appeals process, the two countries have similar requirements regarding procedure within the confines of arbitration itself, including the duties of the arbitrator.⁹

This Comment will further examine the similarities and differences between Israeli and American commercial arbitration procedures, focusing on their origins and the courts. Section II of this Comment will discuss the general history of arbitration and the resulting significance of judicial review, rights of appeal, and award confirmation. Section III presents a brief history of the Israeli legal system to provide context for Section IV, which describes Israeli arbitration law and court involvement. Section V then describes U.S. arbitration law and court involvement. Next, in Section VI, this Comment analyzes the differences between countries and possible reasons for such differences. Finally, Section VII concludes by restating the central importance of the origin of the body of law in domestic proceedings, even at a time where arbitral proceedings are increasingly cohesive internationally.

II. THE HISTORY OF ARBITRATION

Arbitration's origins can be traced back thousands of years.¹⁰ Unlike the history of legal systems and public courts, the history of arbitration is not an account of the growth of legal doctrines and principles.¹¹ Rather, arbitration is a matter of free decision, made on a case-by-case basis using a common sense of moral and economic justice familiar to a community.¹² In fact, arbitration antedates the creation of formal court systems, as disputes were customarily tried and resolved by heads of families or community elders.¹³ Alternative Dispute Resolution (“ADR”) processes were largely derived from community-based societies in which there was a growing need for flexible dispute resolution mechanisms.¹⁴ In the earliest societies for which there are historical accounts, disputes were resolved through traditional ADR mechanisms, including arbitration.¹⁵

Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 564 (2013) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) and E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000)).

8. *Commercial Arbitration Rules & Mediation Procedures*, *supra* note 1; מוסד כללי אתיקה בבוררות, מוסד ישראלי לבוררות עסקית, <http://www.borerut.com/wp-content/uploads/2018/02/klalei-1.pdf> (last visited Sept. 10, 2019) (Isr.) (*Arbitration Rules*, ISRAELI INST. FOR COMMERCIAL ARBITRATION) [hereinafter *Arbitration Rules*].

9. See 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

10. SEEKING ENVIRONMENTAL JUSTICE 126 (Sarah Wilks ed., 2008).

11. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934).

12. *Id.*

13. JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 25 (1918).

14. SEEKING ENVIRONMENTAL JUSTICE, *supra* note 10.

15. Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the USA*, CADMUS No. 3, 100 (Oct. 2011).

In the classical era of ancient Greece, the tradition of *epieikeia*¹⁶ started gaining popularity as the culture shifted towards a greater appreciation of fairness.¹⁷ Arbitration, borne of *epieikeia*, was established as a form of ADR in order to overcome the “exact, clear-cut, and explicit” results of trial¹⁸—it represented an alternative that was not controlled by a formal process that restricted the range of potential outcomes like the emerging rights-based judicial process.

Cicero¹⁹ reasoned that arbitration was a mild and moderate alternative to a trial through the courts.²⁰ Aristotle,²¹ too, espoused views on equity and arbitration:

Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.²²

Aristotle further stated that *epieikeia*, though not itself a recognized legal concept, is a “correction of legal justice,” meaning a way to adjust, even slightly, the black-letter legal rules notoriously lacking flexibility.²³ In deciding arbitral matters, Aristotle advised arbitrators to examine the propriety of the appropriate law and remain aware and considerate of how lawmakers would have resolved the dispute.²⁴ Aristotle recognized that not all disputes can be resolved appropriately by law, and as a remedy, he offered the solution of specific, personalized decrees—as opposed to general laws—to be issued on a case-by-case basis.²⁵ Aristotle viewed arbitration as a resolution mechanism meant to “give equity its due weight, making possible a larger assessment of fairness.”²⁶

16. “Equity.” Anton-Hermann Chroust, *Aristotle’s Conception of Equity (Epieikeia)*, 18 NOTRE DAME L. REV. 119, 121 (1942).

17. See ARISTOTLE, NICOMACHEAN ETHICS: BOOK X (Christopher Rowe trans., 2002). For example, in Book Twenty-Three of the *Iliad*, when Achilles, while hosting the funeral games, argues that it would be *epieikeia* to give a prize to the warrior who came in last (23.537). *Id.*

18. SEEKING ENVIRONMENTAL JUSTICE, *supra* note 10.

19. Cicero was a well-known Roman statesman, lawyer, scholar, and writer in the first century BCE. John P.V., Dacre Balsdon, & John Ferguson, *Marcus Tullius Cicero*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Cicero> (last visited July 19, 2019).

20. SEEKING ENVIRONMENTAL JUSTICE, *supra* note 10.

21. Aristotle was an “ancient Greek philosopher and scientist, [and] one of the greatest intellectual figures of Western history.” Anthony J.P. Kenny & Anselm H. Amadio, *Aristotle*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Aristotle> (last visited Aug. 22, 2019).

22. *Securities Industry Conference on Arbitration*, THE ARBITRATOR’S GUIDE 9 (2019), <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf> (attributing this quote to “Domke on Aristotle”).

23. Darien Shanske, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053, 2057 (2005) (citing ARISTOTLE, *supra* note 17).

24. See ARISTOTLE, *supra* note 17.

25. *Id.*

26. JEROME T. BARRETT & JOSEPH BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT 8 (Oct. 19, 2004). James Lorimer and Roscoe Pound, prominent legal theorists in the Nineteenth and Twentieth Centuries, followed Aristotle’s approach, stating: “If, as some assert, mercy is part of justice, we may say equally that equity is a part of law, in the sense that it is necessary to the working of any legal system.” Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 35 (1905) (citing JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 314 (1880)).

The use of commercial arbitration began in the merchant guilds in Europe during medieval times, roughly 500–1500 CE.²⁷ Merchant guilds were monopolistic in character and, through membership, merchants were entitled to engage in trade within a specific region.²⁸ The guilds were involved with local governments, but their chief function was the protection of member merchants.²⁹ Guilds achieved this objective by maintaining and regulating a trade monopoly.³⁰ In addition to outward regulation, guilds were responsible for internal regulation and dispute resolution.³¹ Members of a guild were bound to bring their disputes before the guild prior to litigating elsewhere.³²

Merchant guilds were not private, voluntary organizations; they drew legitimacy from the monarchy, which allotted them well-defined powers.³³ The reasoning of one monarch, Edward I of England,³⁴ in allotting these powers to guilds was to establish a local body to closely govern, maintain, and regulate merchants and trade practices, ensuring corporal supervision of the source of such vast economic powers.³⁵ “[M]edieval merchants in fairs and marketplaces in England and on the European continent and in the Mediterranean and Baltic sea trade” increasingly used commercial arbitration to resolve disputes.³⁶

The internationality of commercial arbitration originated with the “Courts of the Fair.”³⁷ International merchants who reached continental markets would resolve their disputes according to “fair law,” a set of universal customs for merchants unrelated to local laws.³⁸ King Edward I ordered that arbitration proceedings be resolved promptly and by a neutral party in order to encourage domestic and international trade.³⁹ This direction in English arbitration law later influenced other

27. Wolaver, *supra* note 11, at 133; *The Middle Ages*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/history-of-Europe/The-Middle-Ages> (last visited July 26, 2019).

28. Wolaver, *supra* note 11, at 133.

29. *Id.*

30. *Id.* (citing I GROSS, *THE GILD MERCHANT* 43 (1890)).

31. *Id.* at 134.

32. For example, an arbitration provision from the British Company of Clothworkers: “If any discord, strife or debate shall fortune to happen between one householder and another of the said company—or between them or any of their journeymen or apprentices or between any of the aforesaid persons of the art or mystery of clothworkers which, without prejudice of the laws of the realms, may be appeased by good and wise men; that the said parties, before they move or attempt by course of law any suit between them or against the other in that behalf, shall first show their grief with the circumstance of the same to the wardens of said mystery. . . . And if it shall seem to the masters and wardens that the matter is difficult and beyond their reach to end and determine the same for lack of better understanding of the laws of the realm or the custom of clothiers, that then any of the said parties may take their remedy one against the other without any further licence to be obtained at the hands of the said warden.” Wolaver, *supra* note 11, at 134 (quoting ORD. CLOTHWORKERS, LONDON, 29 ELIZ. (1587)).

33. *Id.*

34. Edward I was King of England from 1272 until 1307. Reginald Francis Trehearne, *Edward I*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Edward-I-king-of-England> (last visited July 3, 2019).

35. Wolaver, *supra* note 11, at 135.

36. Martin Domke, *Arbitration: Commercial Arbitration*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/arbitration> (last visited July 26, 2019).

37. Wolaver, *supra* note 11, at 135–36.

38. Wolaver, *supra* note 11, at 136.

39. See 4 CO. INST. 271 (“[B]ecause that for contracts and injuries done concerning the fair or market, there shall be a speedy justice done for advancement of trade.”). See also WILLIAM PRYNNE, *BRIEF ANIMADVERSIONS ON AMENDMENTS OF, & ADDITIONAL EXPLANATORY RECORDS TO, THE FOURTH PART OF THE INSTITUTES OF THE LAWE OF ENGLAND* 23 (1669) (“We ordain and establish that some certain loyal and discreet man living in London shall be appointed a judge from among the merchants to

compose what a former judge of Israel's High Court of Justice,⁴⁷ The Honorable Haim H. Cohen,⁴⁸ referred to as the "spirit of the Israeli law."⁴⁹ Historically, during the time of the Ottoman Empire, the land of Israel—then called Palestine—was ruled by Turkish law.⁵⁰ During the British Mandate in Israel in the early 1900s, British legislation and case law were introduced to the country's legal system.⁵¹ Today, the British Mandate's ordinances that are still in force, combined with the new codified Israeli civil law, form a developed "Israeli common law" system.⁵²

Israel does not have a formal constitution, but certain basic laws form the backbone of its legal framework and jurisprudence.⁵³ Furthermore, Israel does not have a federal system or a jury system.⁵⁴ Therefore, supremacy, as it relates to U.S. federalism, is not an issue that arises.⁵⁵ The current system is, however, heavily precedent-based, incorporating aspects of Jewish law and heritage to maintain the Jewish essence of the state and the status quo between the secular and religious parties.⁵⁶ Overall, the role of the judiciary in Israeli legal reform is of great significance. Consistent with common law principles, Israeli courts took on the role of law-making, which is the creation of binding norms by the judicial branch.⁵⁷ Thus, the principle of *stare decisis*⁵⁸ is not only relevant, but *central* to Israeli law.

Former Israeli Chief Justice Aharon Barak identified three types of judicial precedent: interpretative, filling the gap, and developing the law.⁵⁹ First, when the court is faced with different interpretations, the judge must choose the best applied option among them.⁶⁰ Second, functional judicial law-making takes place when a judge has to fill gaps in the law when no applicable relevant law was enacted by

47. The High Court of Justice is Israel's equivalent to the Supreme Court of the United States. *The Judiciary: The Court System*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (2013), <https://mfa.gov.il/mfa/ab/outisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx>.

48. Haim Herman Cohen was an Israeli jurist and politician. He authored works about Jewish and Israeli law, specifically concentrating on historical influences. *Haim Cohen*, KNESSET WEBSITE (2018), https://www.knesset.gov.il/mk/eng/mk_eng.asp?mk_individual_id_t=699.

49. Roznai & Volach, *supra* note 43, at 29–30.

50. *Id.* at 30.

51. *Id.* at 29.

52. *Id.*

53. DOING BUSINESS IN ISRAEL: OVERVIEW, PRACTICAL LAW COUNTRY Q&A 7–501–0552 (last updated Jan. 1, 2019). "Regarding the question of the superiority of the basic laws over other laws, there are differences of opinion. Some claim that the basic laws are not superior to an ordinary law, unless they include a specific stipulation to the contrary. These base their position on the argument that since a basic law is passed by an ordinary majority (i.e., a majority of those voting), such a majority cannot grant superior status to a piece of legislation. Others claim that the superiority of basic laws stems from the fact that they are the product of the Knesset acting as the Constituent Assembly, and that from their mere definition as 'basic laws' one may conclude that they are constitutionally superior." The High Court of Justice ("HCJ") handed down several rulings that shape the importance of basic laws. For example, "[o]n October 14, 1999, the HCJ ruled, . . . with a make-up of 11 judges, that an article in a law, which contradicted Basic Law: Human Dignity and Liberty, was null and void." *Basic Laws: Introduction*, THE KNESSET, <https://m.knesset.gov.il/EN/activity/Pages/BasicLaws.aspx> (last visited Aug. 25, 2019).

54. DOING BUSINESS IN ISRAEL: OVERVIEW, *supra* note 53.

55. *Id.*

56. Roznai & Volach, *supra* note 43, at 29.

57. *Id.* at 28.

58. *Stare decisis* means "to stand by things decided" in Latin. In short, it means binding precedent. The Supreme Court's rulings are binding upon every court, with the exception of itself. Timothy Oyen, *Stare decisis*, CORNELL LAW SCH. (Mar. 2017), https://www.law.cornell.edu/wex/stare_decisis.

59. Roznai & Volach, *supra* note 43, at 28.

60. *Id.*

law-makers.⁶¹ Lastly, new laws are developed when a judge’s decision goes against legal standards to correct flaws in existing norms.⁶²

In contrast with other common law systems, Israel has no permanent law-making commission.⁶³ In complicated legal reform, where special knowledge and expertise in a specific field is required, the Minister of Justice appoints an *ad hoc* legislative committee to draft a proposed bill.⁶⁴ The Legislation Department at the Ministry of Justice centralizes law reform and effectively obviates the need for a separate law reform commission.⁶⁵ Despite these structural differences in legislature and the law, Israeli and U.S. courts’ similar reliance on common law and precedent stems from a shared origin in English law.

IV. ARBITRATION PROCESS AND COURT INVOLVEMENT IN ISRAEL⁶⁶

Arbitration laws in Israel began under Ottoman rule.⁶⁷ In 1926, under the British Mandate, the use of Turkish law ended in favor of British law.⁶⁸ In 1968, however, the Knesset⁶⁹ reenacted some of the prior Ottoman arbitration laws.⁷⁰ The Knesset reserved the court’s ability to involve itself in arbitral proceedings, but similar to U.S. courts, Israeli courts abstain from doing so in the absence of aggravating circumstances.⁷¹ The Israeli Arbitration Act (“the Act”) was implemented in 1968 and remains the governing law for arbitrations in Israel today.⁷² The Act has several unique provisions, including one that provides the parties with pre-selected arbitrators.⁷³ Additionally, the Act includes a provision that focuses on public policy by allowing an arbitral appeal directly to the Israeli

61. *Id.*

62. *Id.* at 28–29.

63. *Id.* at 30.

64. *Id.*

65. While this system enjoys vast flexibility, it is also incoherent and ineffective. Furthermore, “Israel has no definition of law reform, no clear and formal rules regarding when to appoint a commission of experts, what its composition should be etc.” Roznai & Volach, *supra* note 43, at 31.

66. Due to the limited accessibility of foreign judicial materials, this Section does not include case law citations.

67. The Mecelle was the Ottoman Empire’s codex of civil law, largely based on Muslim law. Though most of the Mecelle’s application ended with the British Mandate, some laws survived and appear in modern Israeli state law, including some of the Israeli Rules of Evidence. רות גביון, ביטול המג'לה: המנהג תש"ח (Ruth Gavinson, *Cancellation of the Mecelle: The Tradition and Principles*, 14 MISHPATIM MAG. 325, 325–66 (2015)).

68. See generally ABRAHAM BEN EZRA & JONATHAN S. GOLAN, *ARBITRATION THEORY AND PRACTICE* (1997).

69. The Knesset is the Israeli parliament, the state’s legislative body. *The State Legislature: The Knesset*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, <https://mfa.gov.il/mfa/aboutisrael/state/pages/the%20state-%20legislature-%20the%20knesset.aspx> (last visited Aug. 25, 2019).

70. See generally EZRA & GOLAN, *supra* note 68;

71. חמש הערות על הבוררות בישראל, רונן סטי ושות', משרד עורכי-דין בוררות ויישוב סכסוכים (5 Comments on Israeli Arbitration, RONEN SHTI & SHOTH LAW FIRM (2016)).

72. An exception is small claims court, which may conduct arbitrations in small claims matters. See Israeli Arbitration Act, *supra* note 6.

73. *Id.*

73. *Id.*

High Court of Justice for disputes arising between employees of public emergency services and the State to prevent strikes and risks to public safety.⁷⁴

The Act also provides a form of “insurance” for the parties through a default appendix within the statute. Utilizing the default add-on form helps parties contract to keep a right to appeal the award within the arbitral institution or a personalized *ad hoc* proceeding.⁷⁵ The form provides that if disputing parties believe the merits of their case were wrongly decided, they must request an appeal within sixty days of the issuance of the arbitral award or their contracted-for right of appeal will exceed the statute of limitations.⁷⁶ The appeal provides the parties the opportunity to be heard by a new arbitrator, appointed according to appropriate institutional rules or by a judge in cases of *ad hoc* arbitration.⁷⁷ For example, the rules of the Israeli Institute for Commercial Arbitration (“IICA”) state that a new arbitrator will be appointed by the president of the IICA.⁷⁸ If the parties agree on their mutually beneficial right of appeal, the arbitral award takes effect only once the statute of limitations to appeal has passed, and only if no appeal was filed.⁷⁹ This approach is of great significance because it demonstrates an explicit attempt to provide the parties with the knowledge that they have the right to be heard.⁸⁰

Arbitration processes in Israel can be managed by several arbitral institutions.⁸¹ Arbitral institutions have additional rules that rely on the law but also provide support in terms of structure and procedural fairness for arbitrating parties.⁸² The IICA determined that if no jurisdiction is identified in the arbitral agreement, the Jerusalem Court⁸³ has ultimate jurisdiction over the dispute and may decide to accept the matter or direct the parties to another court as it finds appropriate.⁸⁴ These elements allow Israeli courts and arbitral institutions to play a substantial role in commercial arbitration. Comparatively, U.S. commercial arbitration involves lesser judicial control, yet arbitral institutions constructed similar rules.

74. גיורא אלוני, עניינים שיוכרעו אך ורק בבוררות ועניינים שאינם ברורים, סולחה פורטל הגישור הישראלי, <https://www.sulcha.co.il/unarbitration/> (Isr.) (Giora Aloni, *Matters to Be Decided Only in Arbitration & Non-Arbitrable Matters*, SULCHA: THE ISRAELI ALT. DISPUTE RESOLUTION PORTAL (2017)).

75. Israeli Arbitration Act, *supra* note 6.

76. *Id.*

77. *Id.*

78. *Arbitration Rules*, *supra* note 8, at § 11.4.1.

79. *Id.* at § 11.1.

80. Israeli Arbitration Act, *supra* note 6, at § H(21).

81. The biggest commercial institution is the IICA, established in 1991 by the Federation of Israeli Chambers of Commerce. אודותינו, המוסד הישראלי לבוררות עסקית, <http://www.borerut.com/אודותינו/> (*About Us*, THE ISRAELI INST. FOR COMMERCIAL ARBITRATION) (last visited Sept. 10, 2019). Another institution that provides arbitral rules is the Tel-Aviv and The Center Chamber of Commerce. It is the biggest Israeli business organization, and as such, it provides both mediation and arbitration services. אודות: בוררות עסקית, לשכת המסחר תל אביב והמרכז, <https://www.chamber.org.il/serviceslobby/1093/> (Isr.) (*About: Commercial Arbitration*, TEL-AVIV & THE CTR. CHAMBER OF COMMERCE) (last visited Sept. 10, 2019).

82. In striking contrast to the AAA, the IICA mentions the atmosphere of the conference room on its official website. Specifically, it provides details about the peaceful and relaxed space, light refreshments, and the open and pleasant environment intended to ease parties’ discussions. בוררות, המוסד הישראלי לבוררות עסקית, <http://www.borerut.com/בוררות/> (*Arbitration*, THE ISRAELI INST. FOR COMMERCIAL ARBITRATION) (last visited Sept. 10, 2019).

83. Based on Jerusalem’s standing as Israel’s capital. *Jerusalem*, ENCYCLOPEDIA BRITANNICA (last updated Sept. 5, 2019), <https://www.britannica.com/place/Jerusalem>.

84. *Arbitration Rules*, *supra* note 8, at § 11.

V. THE U.S. ARBITRATION PROCESS AND COURT INVOLVEMENT

While some courts around the world are intertwined with ADR systems—either by utilizing ADR techniques in the courts or allocating authority to arbitral processes—courts in the United States are mostly independent from ADR.⁸⁵ The courts are a part of the judicial branch of government, while arbitration is a private process paid for by the parties.⁸⁶ This is particularly true in commercial arbitration where counsel often negotiate for an arbitration agreement on behalf of their respective party as part of their main dealings contract.⁸⁷

American law is derived from the English common law system, but modernized arbitration laws represent an exception.⁸⁸ The Arbitration Act was enacted in the U.S. about sixty–five years prior to its English equivalent.⁸⁹ Of the thirteen British–American colonies, Massachusetts was the first to officially adopt arbitration laws, and Pennsylvania followed.⁹⁰ As New York grew to be an immigration hub, the New York Chamber of Commerce joined the movement in 1768, appointing arbitration committees to create “what has been referred to as the oldest American tribunal for the resolution of commercial disputes.”⁹¹ Federally, Congress enacted the Erdman Act in 1898 to strengthen the Arbitration Act of 1888, starting a slow trend towards improvement and fine tuning of the law, ultimately leading to the Federal Arbitration Act (“FAA”) that governs today.⁹²

American commercial arbitration is federally controlled by the FAA.⁹³ The FAA governs transactions involving maritime matters and interstate commerce, with an exception carved out for labor and employment disputes.⁹⁴ In *Southland Corp. v. Keating*,⁹⁵ the Supreme Court of the United States held that the FAA preempts state law concerning the enforceability of arbitration agreements.⁹⁶ Moreover, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁹⁷ the Supreme Court held the FAA to be both substantive and procedural in nature.⁹⁸

Arbitrators issue a final and binding award in order to prevent deterrence of parties from utilizing arbitral proceedings due to lack of enforceability.⁹⁹ In the past, U.S. courts were hostile towards arbitration,¹⁰⁰ which hindered the

85. Gary Benton, *Arbitrators Are Not Judges*, SILICON VALLEY ARBITRATION & MEDIATION CTR., <https://svamc.org/arbitrators-are-not-judges/> (last visited Sept. 10, 2019).

86. *Id.*

87. Domke, *supra* note 36.

88. Steven A. Certilman, *Brief History of Arbitration in the U.S.*, 3 N.Y. STATE BAR ASS’N DISP. RESOL. LAW. 4, 10 (2010).

89. *Id.* at 11.

90. *Id.*

91. *Id.* at 10.

92. *Id.* at 12.

93. Stuart M. Widman, *Piecing Together Your Client’s Victory*, 14 A.B.A. BUS. LAW TODAY 1 (Sept. 2004), <http://apps.americanbar.org/buslaw/blt/2004-09-10/widman.shtml>; 9 U.S.C. § 1 (1947).

94. 9 U.S.C. § 1 (1947).

95. 465 U.S. 1 (1984).

96. *Id.*; *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445 (2006).

97. 388 U.S. 395 (1967).

98. *Id.* at 405.

99. BARRETT & BARRETT, *supra* note 26.

100. See Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associations*, CARDOZO SCH. OF LAW, <https://cardozo.jcr.com/wp-content/uploads/2013/05/CAC301.pdf> (last visited Sept. 10, 2019).

confirmation of arbitral awards.¹⁰¹ In response to this general skepticism, the Supreme Court granted arbitrators broad powers to decide arbitral awards, so long as the arbitrator remained strictly within the boundaries of the contract—specifically, the arbitration provision the parties agreed upon.¹⁰² In other words, the law binds the arbitrator to the language of the parties’ agreement in deciding their final award, yet allows a wide array of disputes to be arbitrated.¹⁰³ In *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁰⁴ the Supreme Court ruled that arbitrators have jurisdiction to make decisions in cases involving statutory and policy claims, as well as torts claims.¹⁰⁵

An important aspect of U.S. arbitration is the parties’ right to choose their arbitrator.¹⁰⁶ Parties entrust their appointed arbitrator with understanding and resolving their dispute, relying on the arbitrator’s expertise in the relevant field.¹⁰⁷ In *AT&T Technologies, Inc. v. Communications Workers of America*, the Supreme Court held that the arbitrability¹⁰⁸ of a dispute is for the court to decide.¹⁰⁹ Yet, the merits of the dispute and all substantive interpretation of the contract between the parties are under the arbitrator’s jurisdiction.¹¹⁰ It follows that the arbitrator, not the court, has jurisdiction to determine the validity of the entire contract.¹¹¹ The Supreme Court further held that the parties could not “supplement by contract” reasons for a court to apply “expedited judicial review to confirm, vacate, or modify arbitration awards.”¹¹²

Since Congress established the FAA in 1925,¹¹³ many states have adopted arbitration statutes of their own.¹¹⁴ The statutes of states focus on defining the scope

101. The arbitral tribunals are a private entity without any police powers. In order to enforce an award, a party must file a motion to confirm under section nine. See 9 U.S.C. § 9 (1947).

102. *Id.* at §§ 7, 11.

103. *Id.* at § 10.

104. 500 U.S. 20, 26 (1991).

105. *Id.* Michael G. Holcomb, *Demise of the FAA’s Contract of Employment Exception—Gilmer v. Interstate/Johnson Lane Corp.*, 1992 J. DISP. RESOL. 213 (1992) (“The recent trend in the federal courts is to expand the scope of the Federal Arbitration Act (FAA) to include statutory claims. *Gilmer v. Interstate/Johnson Lane Corp.* illustrates this trend by compelling claims under the Age Discrimination in Employment Act of 1967 (ADEA) to arbitration pursuant to an arbitration clause in an employment contract.”).

106. Or arbitral panel, if the parties so agreed. 9 U.S.C. § 5 (1947).

107. Benton, *supra* note 85.

108. The American definition of arbitrability is a broad one that refers to who decides jurisdiction (the arbitrator or the court); it covers all questions relating to the jurisdiction of the arbitral tribunal. In contrast, the narrow interpretation—which is common internationally—refers to the arbitrability of the subject matter; whether mandatory law in a given jurisdiction disallows arbitration of disputes dealing with a particular subject matter because that subject matter is infused with high order public policy concern. Laurence Shore, *Defining ‘Arbitrability’*, N.Y. LAW JOURNAL (June 15, 2009), <https://www.law.com/newyorklawjournal/almID/1202431398140/>.

109. 475 U.S. 643, 652 (1986) (holding “[t]hat issue should have been decided by the District Court and reviewed by the Court of Appeals; it should not have been referred to the arbitrator.”).

110. *Preston v. Ferrer*, 552 U.S. 346 (2008); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 440 (2006).

111. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

112. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 579 (2008).

113. The FAA was enacted to aid businesses in legitimizing their adjudicatory dispute resolution processes. William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193, 207 (1956).

114. *Alternative Dispute Resolution—State Laws*, LEGAL INFO. INST.: CORNELL UNIV. LAW SCH., http://www.law.cornell.edu/wex/table_alternative_dispute_resolution (last visited Sept. 10, 2019).

of control in the particular jurisdiction.¹¹⁵ State statutes are, however, much less detailed than the FAA, so they are seldomly used by commercial parties attempting to avoid uncertainty of outcome.¹¹⁶ Therefore, the FAA continues to be the most widely-cited domestic law, as it is has been the most thoroughly litigated and is thus the most predictable.¹¹⁷ Soon after the FAA was introduced, the U.S. Arbitration Association (“AAA”) was founded.¹¹⁸ The AAA provides administrative services, including design and development of ADR systems, to individuals and organizations.¹¹⁹ Domestically, the AAA arbitration rules are the most commonly used in commercial arbitration.¹²⁰

VI. CROSS-COUNTRY COMPARISON

The U.S. and Israeli arbitration systems have much in common in terms of institutional choice of arbitrators and the informal spirit of hearings in comparison to litigation.¹²¹ The similarities between the Act and the FAA are in line with many international standards such as, for example, the impartiality and neutrality requirements of an arbitrator, the final and binding nature of the award, and the special carve-outs with respect to labor and employment matters.¹²² Both acts include provisions that give parties the freedom to choose their preferred arbitration track, choosing between institutional arbitration and an *ad hoc* proceeding, tailoring the contract to the parties’ specific wants and needs.¹²³ Nevertheless, when comparing court involvement in Israeli and American commercial arbitration, a few differences arise from national laws and domestic institutional rules.¹²⁴

A. Prior to Arbitration

In Israel, the Act provides that parties may resolve their dispute in arbitration only if they present a written arbitration agreement, signed freely and willfully by all parties, and only if the parties could contract about the disputed matter according to contract law.¹²⁵ The FAA assigns similar responsibilities to parties contracting

115. States established their own arbitration legislature. *Id.*

116. Walter Dellinger, *Constitutional Issues in Federal Arbitration*, U.S. DEP’T. OF JUST. (Sept. 7, 1995), <https://www.justice.gov/olp/constitutional-issues-federal-arbitration>.

117. See generally Jon O. Shimabukuro & Jennifer A. Staman, *Mandatory Arbitration & the Federal Arbitration Act*, CONG. RESEARCH SERV. (Sept. 20, 2017), <https://fas.org/sgp/crs/misc/R44960.pdf>.

118. *The American Arbitration Association: A Long History of Working With Government*, AM. ARBITRATION ASS’N, 1, https://www.adr.org/sites/default/files/document_repository/AAA%20Government%20Services.pdf (last visited Sept. 10, 2019).

119. *About the AAA & ICDR*, AM. ARBITRATION ASS’N, <https://www.adr.org/about> (last visited Sept. 10, 2019).

120. ARBITRATION PROCEDURES & PRACTICE IN THE U.S.: OVERVIEW, PRACTICAL LAW COUNTRY Q&A 0–502–1714 (last updated Jan. 1, 2017).

121. See 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

122. See generally 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

123. מהי? המדרין, משפטי זאפ ישראל שמעוני, <https://www.mishpati.co.il/article/665> (Isr.) (Israel Shimon, *What is Arbitration? A Guide*, MISHPATI ZAP (Nov. 8, 2010)).

124. See generally 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

125. The legislature may have intended to exclude criminal and family matters from arbitration. See *Arbitration Rules*, *supra* note 8; Aloni, *supra* note 74.

for a valid arbitration agreement, requiring the arbitration agreement to be memorialized in writing.¹²⁶

In the United States, court involvement on the front–end of the arbitration—including determination of validity, irrevocability, enforcement of the agreement,¹²⁷ staying proceedings,¹²⁸ failure to arbitrate, and compelling arbitration¹²⁹—is rare because the courts consistently rule in favor of arbitration.¹³⁰ The threshold for court involvement in the early stages of arbitration was designed to encourage parties to choose arbitration as their system of dispute resolution.¹³¹

Israeli law, on the other hand, while also disfavoring court involvement on the front–end of arbitration in order to facilitate a smoother process, is very specific in terms of which matters may be arbitrated. Giora Aloni, an Israeli lawyer, discussed the complexity of the determination in a detailed article and concluded that the courts’ decisions are carefully made on a case–by–case basis.¹³²

B. During Arbitration

While both the United States and Israel provide the parties with an arbitration proceeding that is fully supported by law, court involvement in the arbitration itself is different.¹³³ In Israel, the Act imposes more substantive limitations on the types of disputes that can be arbitrated, whereas in the United States, arbitration over a wider array of disputes is permitted, and parties are not limited to contractual disputes.¹³⁴ For example, the Act mentions several non–arbitrable disputes, including disputes between an employer and employee where the employee is not represented by a labor union.¹³⁵ In contrast, the FAA carved out an exception to its applicability with respect to transportation employees disputes, permitting another statute to govern such arbitrations.¹³⁶

The Act confers to arbitrators the same summons ordering power as any civil court to subpoena witnesses or documents for production of evidence.¹³⁷ Until the hearing date, the court reserves the power, upon witness request, to withdraw the subpoena if a court finds an abuse of power or determines the testimony would be “against the interest of justice.”¹³⁸ The Act also confers upon the arbitrator several powers traditionally given to a judge in the interest of facilitating fair proceedings.¹³⁹ Moreover, if the parties contracted for arbitration time limits before

126. 9 U.S.C. § 2 (1947).

127. *Id.*

128. *Id.* at § 3. The court held that the district court has no discretion to dismiss a case, and that it must stay the trial of the action as arbitration is taking place. ARBITRATION PROCEDURES & PRACTICE IN THE U.S.: OVERVIEW, *supra* note 120.

129. 9 U.S.C. § 4 (1947).

130. Stacy A. Carpenter & Britton St. Onge, *U.S. Supreme Court Again Rules for Arbitration, Rejecting Judge–Made Doctrine That Gave Courts Authority to Reject Arbitration*, NAT’L L. REV. (Jan. 14, 2019).

131. *Id.*

132. Aloni, *supra* note 74.

133. 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

134. *See generally* Israeli Arbitration Act, *supra* note 6; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

135. Aloni, *supra* note 74.

136. Widman, *supra* note 93; 9 U.S.C. § 1 (1947).

137. Israeli Arbitration Act, *supra* note 6.

138. *Id.* at § D(13)(B).

139. *Id.* at § D(16)(A).

the dispute arose, and the court concludes it is in the interest of justice to sever limiting provisions, the court may do so under appropriate conditions.¹⁴⁰

In an attempt to ensure smooth proceedings, the Israeli legislature also conferred the arbitrator powers similar to a judge in terms of issuing an award in cases of party absences.¹⁴¹ In the absence of a party from a hearing, an arbitrator is permitted to continue with the hearing;¹⁴² even if the missing party was scheduled to present their side at that time, the arbitrator may still decide the case in the party's absence.¹⁴³ If, within thirty days of such an award, the arbitrator is convinced the party's absence from the proceedings was justified, the arbitrator may annul the award and renew the hearing.¹⁴⁴ If one of the parties moves to stay proceedings, however, the court has broad discretion—as long as the judge finds it to be “in the interest of justice”—to order the parties to remain in court.¹⁴⁵ A request to stay arbitration must be filed to the civil court, and if it is not filed with a “defense order,” it will not be accepted.¹⁴⁶

Unlike the Act, the FAA does not provide the arbitrator with powers resembling judicial powers.¹⁴⁷ Instead, the AAA commercial arbitration rules entrust the arbitrator with some legal powers in the discovery process, including “issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.”¹⁴⁸ The FAA is less prescriptive than the Act, resulting in U.S. arbitral institutions having the ability to construct their rules more freely, as broadly or narrowly as they deem appropriate.

C. Post-Arbitration

Courts in the United States and Israel impose high thresholds for the parties to overcome in seeking judicial review.¹⁴⁹ The Act explicitly states that an arbitral award cannot be appealed on the merits and provides for a significantly limited right of judicial review.¹⁵⁰ Similarly, the Supreme Court's interpretation of the FAA does not permit an appeal on the merits and provides parties with very limited judicial review.¹⁵¹ The rationale relied upon in limiting judicial review is that “arbitration's relatively enhanced efficiency ‘improves upon the court system for dispute resolution’ and thus makes it an attractive dispute resolution model.”¹⁵²

As mentioned previously, the Act provides a default add-on form to allow parties to maintain their right to appeal within the arbitral institution or *ad hoc* proceedings, suggesting the legislative committee wanted parties to be aware of

140. “Appropriate conditions” are not defined by the Act, providing the judge absolute freedom in extending proceedings. *See id.* at § B(7).

141. Israeli Arbitration Act, *supra* note 6.

142. *Id.* at § D(15)(A).

143. *Id.* at § D(15)(A)–(B).

144. *Id.* at § D(15)(B).

145. *Id.* at § B(5).

146. *Id.* at § B(6).

147. *See* 9 U.S.C. §§ 1–16 (1947).

148. *Commercial Arbitration Rules & Mediation Procedures*, *supra* note 1, at 19–20, R–21–23.

149. *Supra* Sections IV & V.

150. Israeli Arbitration Act, *supra* note 6, at § H.

151. 9 U.S.C. §§ 1–16 (1947); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 572 (1960).

152. Nico Gurian, *Rethinking Judicial Review of Arbitration*, 50 COLUM. J.L. & SOC. PROBS. 507, 509–10 (2017) (quoting Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT'L ARB. 163, 173 (2011)).

their rights.¹⁵³ The ability to appeal an arbitral award within the arbitral institution is not uncommon internationally,¹⁵⁴ but the statute providing a default document allowing the parties to retain this right sets apart Israeli and American law.¹⁵⁵ Statutory differences suggest that Israeli courts are invested in providing parties an avenue for relief following a binding decision, recognizing the parties' option to not entirely forego their right of appeal in favor of arbitral proceedings.¹⁵⁶ While maintaining parties' rights to appeal is not uncommon, it *is* uncommon to include a default form within the statutory body of law rather than within the rules of arbitral institutions.¹⁵⁷

In Israel, the Act explicitly requires arbitrators to issue reasoned awards and maintain confidentiality.¹⁵⁸ Additionally, the IICA imposes a one-month time limit from the time of the last hearing in which the arbitrator must provide the parties with a reasoned award.¹⁵⁹ In the United States, however, the FAA does not require the arbitrator to provide parties with a reasoned award or confidentiality, and the choice to include these features is generally decided via the use of arbitral rules or contractual provisions.¹⁶⁰ In spite of the law itself appearing more lenient, the AAA rules go further than the IICA, allotting the arbitrator only fourteen days to issue an award from the closing of the last hearing.¹⁶¹

An additional feature of Israeli commercial arbitration is centered around payment to IICA arbitrators. The president of IICA provides parties with a list of arbitrators deemed appropriate for the individual dispute,¹⁶² similar to what a case manager does in the AAA,¹⁶³ but all payments thereafter are made directly to the institution which then pays the arbitrator to avoid the likelihood and perception of improper payments.¹⁶⁴ The AAA rules do not provide for all payments to be made through the institution, but they do provide that the arbitrator has the power to decide the allocation of costs accrued through production of documents and legal costs.¹⁶⁵

Finally, the Act makes an explicit reference to appropriate jurisdiction where the parties did not contract for it,¹⁶⁶ whereas the FAA is not so direct, thereby conferring more freedom to arbitral institutions.¹⁶⁷ The AAA formulated a rule

153. Israeli Arbitration Act, *supra* note 6, at § H(21).

154. Commercial disputes in countries such as France, Belgium, and South Africa provide for appeal. Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?*, 7 PEPP. DISP. RESOL. L.J. 269, 270 (2007).

155. Israel published a new set of arbitral rules for international commercial disputes. The rules mirror the domestic Israeli rules and provide the parties with a flexible right of appeal within the institution. Eric S. Sherby, *Israel's New International Arbitration Rules*, 21 N.Y. STATE BAR ASS'N INT'L L. PRACTICUM 1, 39 (2008).

156. *See* 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

157. Gleason, *supra* note 154, at 270.

158. *See* 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

159. *Arbitration Rules*, *supra* note 8.

160. *Commercial Arbitration Rules & Mediation Procedures*, *supra* note 1.

161. *Id.* at 36, at § E–9.

162. *Arbitration Rules*, *supra* note 8.

163. *Arbitrator Selection*, AM. ARBITRATION ASS'N, <https://www.adr.org/ArbitratorSelection> (last visited Sept. 10).

164. *Arbitration Rules*, *supra* note 8.

165. *Commercial Arbitration Rules & Mediation Procedures*, *supra* note 1, at 19–20, R–21–23.

166. Israeli Arbitration Act, *supra* note 6.

¹⁶⁷ *See* 9 U.S.C. §§ 1–16 (1947).

about arbitrators' scope of jurisdiction, explicitly giving the arbitrator jurisdiction over the "existence, scope, or validity of the arbitration agreement."¹⁶⁸

Though there are some procedural differences between the two countries, similar requirements must be met for confirmation of an arbitral award in Israel and the United States.¹⁶⁹ In terms of international enforcement, because Israel and the United States are both signatories to the New York Convention, awards will be upheld by all contracting states and signatories.¹⁷⁰ Much like the U.S. code, which codifies the New York Convention in the chapter following the FAA,¹⁷¹ the Act provides that Israel will respect all the international conventions and treaties to which it is a signatory.¹⁷² Thus, the arbitral award granted in either country will be respected by most jurisdictions around the world.¹⁷³

VII. CONCLUSION

The differences between U.S. and Israeli arbitration procedures, evident in the comparison of law detailed above, may be traced back to the two countries' origins of law and diverse legislative goals. The United States and Israel have some overlapping legal principles dating back to time periods in which both countries' territories were under British rule before becoming independent.¹⁷⁴ Nonetheless, Israel heavily relied on Ottoman law, which governed the territory for centuries longer than the British law, when enacting its arbitration laws.¹⁷⁵ As a result, the scope British influence on each country's arbitration laws varies. While the parties can contract around some of the differences, the variation in court involvement is an important consideration in drafting an arbitration agreement.

The Knesset allocates arbitral proceedings and arbitrators in Israel more authority and formal power than granted under U.S. law but limits arbitrators' independence from the judicial branch. In the United States, Congress instituted an independent process of arbitration, almost entirely separate from the courts, that resulted in less overall authority conferred to arbitrators, yet a wide availability of private dispute resolution processes.

168. *Commercial Arbitration Rules & Mediation Procedures*, *supra* note 1, at § R–7.

169. See 9 U.S.C. §§ 1–16 (1947); Israeli Arbitration Act, *supra* note 6.

170. U.N. Comm'n on Int'l Trade Law, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL (1958), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf.

171. 9 U.S.C. §§ 201–08 (1970).

172. Israeli Arbitration Act, *supra* note 6, at § B.

173. U.N. Comm'n on Int'l Trade Law, *supra* note 170.

174. *British Palestine Mandate: History & Overview (1922–1948)*, *supra* note 45; *British Empire: Living in the British Empire—North America*, THE NAT'L ARCHIVES, <http://www.nationalarchives.gov.uk/education/empire/g2/cs5/background.htm> (last visited Sept. 10, 2019).

175. See Roznai & Volach, *supra* note 43.

