

A Primer on Commercial Litigation in Israel

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PART I: THE COSTS OF LITIGATION

Litigation is generally an expensive activity, and litigation in Israel – especially for a foreign company or individual – is no exception.

In international litigation, more often than not, the foreign litigant is on the *defense* side. Therefore, the ability of an Israeli *plaintiff* to *finance* a lawsuit is naturally of interest to foreign defendants. Contingency-fee billing arrangements *are* generally acceptable for an Israeli plaintiff's lawyer. Therefore (and unlike the rule in some common law countries), it cannot be presumed that only well-off plaintiffs can finance protracted litigation.

Thus, taking the typical case of a dispute between a former (local) distributor and a foreign manufacturer, it is common for the plaintiff's counsel to work on a contingency basis.

Also, because English is not an official language of Israel, the need to pay for translations and/or interpreters only increases the costs upon foreign litigants (whether plaintiff or defendant).

The issue of the costs of litigation can arise, as a procedural matter, at various points in a commercial case.

At the outset: The plaintiff is required to pay a *filing fee* to the court. The amount of the filing fee is determined by the nature of the relief sought in the statement of claim (the

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equivalent of the complaint). The filing fee for almost all monetary claims is 2.5 percent of the amount sought; half of that amount (1.25 percent) must be paid upon filing the case, and the other half (1.25 percent) is payable twenty days before the evidentiary stage (trial) of the case.

As for claims and proceedings that cannot be quantified monetarily (such as injunctions), the filing fee is the New Israeli Shekel equivalent of between \$100.00 and \$200.

After the filing of a statement of defense (answer): The court has the discretion to order a plaintiff to deposit security (generally in the form of a bank guaranty) for payment of all of the anticipated legal costs of the defendant. This discretion is routinely exercised when a *foreign* plaintiff sues in Israel. A motion for an order requiring the plaintiff to deposit security is usually made shortly after the defendant files its statement of defense.

Israel is a party to the Hague Convention on Civil Procedure (1904) and the Hague Convention (1954). Therefore, with respect to a plaintiff who is a citizen of one of the states that signed either (or both) of such Conventions, an Israeli court does not have discretion to order the plaintiff – merely because he is a foreigner – to deposit security to cover anticipated legal costs of the defendant.

After adjudication: The general rule is that every successful plaintiff is entitled to be compensated for interest and “linkage”; payments (on judgments) are linked to an index that essentially tracks the value of the Shekel to the US dollar.

The general rule is that the losing party pays at least some amount of its adversary’s legal costs.

The trial court has substantial discretion in determining the amount of costs. The court takes into account the amount of the claim as well as the amount of the relief that was actually awarded. The court may also consider the manner in which the litigants conducted the case.

PART II: SUBSTANTIVELY, WHERE DOES ISRAEL FIT IN?

Prior to the establishment of the State of Israel in 1948, the country was ruled by the British Mandate over Palestine. Through 1948, English

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common law was essentially the only source of law in Mandatory Palestine. With the establishment of the State of Israel, English law was accorded substantial weight by the Israeli legislator and courts, and English law is still considered of persuasive authority. At the same time, American law has attained a similar status.

Israel is a signatory to several international treaties that affect international commerce: (a) Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, (b) Convention Abolishing the Requirement of Legalization For Foreign Public Documents, (c) Convention On The Taking Of Evidence Abroad in Civil or Commercial Matters, (d) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (e) United States Convention on Contracts For The International Sale of Goods, and (f) the Convention for the Unification of Certain Rules Relating to International Carriage by Air (commonly known as the Warsaw Convention).

PART III: THE COURTS IN WHICH COMMERCIAL DISPUTES ARE LITIGATED

The highest court in Israel is the Supreme Court, based in Jerusalem, Israel's capital.

The Supreme Court hears cases in one of two capacities – in its capacity as the highest appellate court in Israel, or in its capacity as the “High Court of Justice.” When sitting in such capacity, the Supreme Court is the court of first (and last) instance. In such capacity, the Supreme Court's jurisdiction includes:

- (a) ordering governmental authorities and others carrying out public functions under law, to do or refrain from doing any act, and
- (b) ordering courts and entities that have judicial powers to hear, refrain from hearing, or continue hearing a particular

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matter or to void a proceeding that was taken improperly or a decision that was improperly given.

In addition to its jurisdiction to hear judicial appeals, the Supreme Court also hears appeals of denials of applications to register trademarks (as opposed to claims of trademark infringement).

Although most commercial disputes are litigated in the District Courts or Magistrates Courts, there are other specialized courts in which it is not uncommon for commercial disputes to be litigated. Those courts are: (a) Labor Courts; (b) the Restrictive Trade Practices Court; and (c) the Standard Contracts Tribunal. *See* Part VIII below for a description of Israel's specialized courts.

Most international commercial disputes are litigated in the courts of Tel Aviv and Jerusalem. Yet maritime claims must be brought before the District Court of Haifa.

PART IV: WHEN WILL AN ISRAELI COURT EXERCISE JURISDICTION?

An Israeli court (generally) acquires jurisdiction over a foreign defendant *upon service* on that defendant of the summons and the complaint.

A. “Long-Arm” Jurisdiction

The general rule with respect to service abroad is that the plaintiff must apply for and obtain *leave of court* to serve process out of Israel. Such a motion is (obviously) made *ex parte*. The bases for granting permission to serve abroad are set forth in Rule 500 of the Civil Procedure Regulations, which is the functional equivalent of an American “long-arm” jurisdiction statute.

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Rule 500 authorizes an Israeli court to permit service abroad in any of the following cases (among others):

- (1) relief is sought against a person whose regular residence is in Israel;
- (2) the action concerns an obligation with respect to real estate in Israel;
- (3) the action is to enforce, nullify, or invalidate a contract, or for any act in respect to same, or to receive damages or other relief for its violation, in one of the following cases:
 - (i) the contract was “made” in Israel;
 - (ii) the contract was made by or through an agent in Israel on behalf of a non-Israeli principal;
 - (iii) Israel law, whether expressly or implicitly, applies to the contract;
- (4) the suit seeks to enjoin activity in Israel;
- (5) the suit is based upon any “action or omission” in Israel;
- (6) the action seeks enforcement of a foreign judgment or foreign arbitral award; and
- (7) a person outside of Israel is a “necessary or proper party” to an action “lawfully” brought against another defendant duly served in Israel.

A motion for permission to serve abroad must be supported by an affidavit. Such affidavit is required to state that the declarant believes that the movant (usually the plaintiff) has a good cause of action, and it must specify in what country the defendant can be found. The affidavit is also required to set forth the grounds for the motion to serve abroad.

In an order authorizing service abroad, the court almost always requires the plaintiff to translate the statement of claim and the summons into the language of the recipient country (or at least into the language in which the parties did business, which usually is English). An order

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authorizing service abroad is required to state the deadline (usually 30-60 days) for the defendant to submit reply pleadings.

B. Attacking the Jurisdiction of an Israeli Court/Possible Alternative to Service Abroad

Because of the relative leniency at the *ex parte* stage of deciding motions for leave to serve abroad, it is frequently worthwhile for a foreign defendant to file a motion to cancel (vacate) the order that authorized service abroad.

Frequently a plaintiff's lawyer tries to avoid the inconvenience and cost of serving abroad by serving the court papers upon an Israeli entity that is allegedly the "agent" in Israel of the foreign defendant. Such method of service is considered acceptable when there is an "intensive connection" between the foreign defendant and the Israeli entity alleged to be the foreigner's agent; this method is also permitted when such Israeli entity – including counsel – has been given a general power of attorney from the foreign defendant.

Since the 1990s, Israeli trial courts have become more lenient in holding that a local company is the implied agent for service for foreign manufacturers or licensors.

Absent an "intensive connection" or a power of attorney given to an Israeli, service upon a foreign defendant must be carried out pursuant to an *order* authorizing service abroad.

C. When Might an Israeli Court Discontinue Exercising Jurisdiction?

Even if an Israeli court has properly exercised jurisdiction under Rule 500, there are circumstances under which the court will subsequently stay the case or otherwise cease exercising jurisdiction.

One scenario for refraining from exercising jurisdiction is pursuant to the "inconvenient forum" or *forum non conveniens* doctrine, which is

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similar (although not identical) to the Anglo-American *forum non conveniens* doctrine.

As a general rule, Israeli courts enforce *exclusive* forum selection clauses in international commercial agreements.

If a forum selection clause is not exclusive, it is likely that the Israeli court will retain jurisdiction over the dispute.

One exception to the general rule that forum selection clauses (and arbitration clauses) are enforceable relates to the enforceability of clauses in "standard contracts."

Another general rule is that, if a lawsuit is filed concerning a dispute as to which there is a written arbitration agreement, and if a litigant that is a party to such agreement requests that the court stay the lawsuit, the court is required to issue such a stay. A stay will only be granted if the party requesting the stay expressly represents to the court that he is prepared to do all that is required to conduct the arbitration. Nonetheless, in the domestic context, an Israeli court is permitted to deny a motion for a stay if the court finds a "special reason" why the dispute should not be arbitrated. Such discretion is all but nonexistent in the international context. In other words, with very few exceptions, Israeli courts will grant a stay whenever there is an arbitration clause in an international agreement and such clause covers the dispute.

PART V: PRETRIAL PROCEDURE

A. Time-Table in Commercial Litigation

Civil cases can take a substantial time to get to trial. In part, this is due to the fact that most judges in the Magistrates and District Courts hear criminal matters in addition to civil cases.

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It is also common (especially in Tel Aviv) for cases to be transferred from one judge to another, with no reason being provided to the litigants.

Therefore, lawyers representing plaintiffs look for ways to "fast-track" their lawsuits. Israeli procedure affords them, essentially, two fast-track options: (a) filing a suit by way of "summary procedure" and (b) filing an "originating motion" instead of a statement of claim (complaint).

Summary procedure:

Claims for breach of contract are frequently filed by way of "summary procedure."¹ As a general rule, a plaintiff may file by way of summary procedure when the claim is based upon *written evidence* of a contract or obligation (express or implied) and the suit is for a *liquidated* sum of money.

When a suit is filed by way of summary procedure, the defendant may not respond by filing a statement of defense; rather, the defendant must receive *leave of court* to defend. In order to receive leave to defend, the defendant must file a motion for leave to defend, and such a motion must be supported by an affidavit. The affidavit must explain why the defendant has a good defense to the suit.

The motion for leave to defend generally must be filed within twenty days after service of the statement of claim.

The burden of proof on the defendant is a relatively light one. He does not have to prove that he (or his affiant has) testified truthfully or that he is likely to prevail at trial. He merely has to set forth a factual version that, if proven at trial, would constitute a valid defense to the claim against him.

When the court denies a motion for leave to defend (not a common outcome), the court then grants judgment in favor of the plaintiff.

¹ Despite the similarity in name, a suit filed by way of summary procedure is a very different procedure from "summary judgment" as used in the United States. When an American lawyer forms the view that a case "is a summary judgment case," he/she usually means that the defendant can "get out" of the case on a motion for summary judgment. When an Israeli lawyer says "this is a summary procedure" case, he/she usually means that the case is such a "winner" that the plaintiff should file through the procedure known as summary procedure.

When leave to defend is granted, the affidavit filed by the defendant is generally treated as the statement of defense.

What kinds of cases are filed by way of summary procedure? Claims for goods sold but not paid for, claims for return of money, and loans (just to name a few). Many types of claims that, under American procedure, would qualify as an “account stated” can be filed by way of summary procedure.

Originating motion:

Another “fast-track” method for the initiation of commercial cases is the originating motion. Unlike a claim that seeks money damages, the originating motion seeks resolution of a legal question that affects the rights of certain *types* of litigants.

The originating motion procedure may be used to resolve questions concerning a litigant’s status as an heir, creditor, or beneficiary under a will or a trust. It can also be used to give instructions to administrators or trustees. In disputes relating to such issues, an originating motion may be made brought by a trustee, an administrator, a guardian, or someone claiming to be a creditor, heir, or beneficiary.

Another use of the originating motion procedure is for declaratory relief; however, the originating motion procedure is generally not available for declaratory relief unless such relief is the only type sought by the plaintiff.

Certain disputes relating to partnerships may be brought by way of originating motion.

The filing fee that must be paid when filing an originating motion is approximately \$250.

The defendant/respondent is required to file opposing affidavits no later than seven days before the date on which the motion is set to be heard.

B. Counterclaims and Third-Party Procedures

If a defendant has any claim against the plaintiff, the defendant’s claim may be asserted as a counterclaim (as to which a court filing fee must be paid) or as a set-off (as to which no filing fee need be paid).

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In the standard lawsuit (i.e., not in a case filed by summary procedure or an originating motion), a defendant usually may assert/file, as a matter of right, a third-party notice under the following circumstances:

- (a) the defendant asserts that he is entitled to contribution or indemnification from the third-party defendant for any relief that might be awarded against the defendant in the main action;
- (b) the defendant asserts that he is entitled to relief from a third-party defendant and that such relief is intertwined with that claimed by the plaintiff;
- (c) when the legal question (or controversy) at issue between the defendant and the third-party defendant is essentially the same as that in issue between the plaintiff and the defendant.

As a general rule, a defendant may, within thirty days of being served with the complaint, apply for leave of court to serve a third-party notice in those types of cases described in (a) through (c) above; the court has wide discretion in deciding such a motion and will usually allow the plaintiff an opportunity to state its position on the issue of the propriety of adjudicating the third-party claim along with the main claim.

A third-party defendant generally has thirty days to file his answer.

C. Discovery

With very few exceptions, Israeli procedure does not provide for "depositions" in the American sense of the word. The primary exception is when a witness is expected to leave Israel for a prolonged period of time and is not expected to return until after the trial in the case.

The methods for pre-trial discovery are: (a) general orders requiring the disclosure of relevant documents; (b) orders for disclosure of specific documents; (c) requests to admit facts or documents; and (d) questionnaires (interrogatories).

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PART VI: WHAT IS AN ISRAELI TRIAL LIKE?

In Israel, there are no juries; judges decide issues of fact as well as issues of law. Civil trials are heard by a *sole* judge.

The “trial” stage of a civil case begins with the plaintiff’s submission of case-in-chief affidavits, which is usually followed (approximately sixty days later) with the submission by the defendant of its case-in-chief affidavits. The next step is the cross-examination of the affiants. This process can last months – sometime even years, depending upon the number of witnesses and the ability to schedule their cross-examinations in proximity to each other.

The general rule is that every witness who submits an affidavit must be available for cross-examination at the hearing on the matter for which the affidavit was submitted. When a witness is not available for such cross-examination, his affidavit may be, and generally is, stricken by the court.

The trial judge has discretion to decide *motions* without cross-examination of the affiants.

In connection with an arbitration involving an Israeli witness, the District Court may issue an order requiring such persons to give testimony.

Special Issues Concerning Foreign Witnesses

The official languages of Israel are Hebrew and Arabic. However, it is common in cases involving foreign litigants for affidavits from foreign witnesses to be submitted in English. Because English is not an official language, opposing counsel has the right to insist upon receipt of a Hebrew translation, certified by an Israeli notary, of an affidavit written in a foreign language.

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In order for an affidavit that is executed outside Israel to be admissible in an Israeli court, it must be authenticated pursuant to Israeli law. Authentication may be done in one of two ways: (a) at the Israeli Embassy (or Consulate) in the foreign country, the witness can sign the affidavit before an official authorized by Israeli law to caution witnesses regarding the penalties of perjury or (b) the witness's signature can be authenticated through the "consular chain" method, whereby a consular official certifies the validity of a local notarial certification (or multiple certifications).

Although in recent years there has been an increase in the number of cases permitting the use of videoconferencing for cross-examining foreign witnesses, the use of videoconferencing as a substitute for in-person cross-examination is still the exception.

PART VII: SPECIAL PROCEEDINGS

A. Order of Attachment of Assets

A plaintiff may request that the court grant an order attaching the assets of the defendant pending a final adjudication of the suit. An order of attachment may cover property in the possession of the defendant as well as property of the defendant in the possession of other persons. (Such a third party is referred to as a "holder.") An attachment order may also cover property of the defendant that is in the possession of the plaintiff.

To succeed on a motion for an order of attachment, the plaintiff must prove that (a) the claim is for a sum of money (or for recovery of specific property); (b) the claim is supported by documentary or other credible evidence, and (c) the failure to grant an order of attachment is liable to impede enforcement of any eventual judgment in the case.

There are additional procedural/logistical requirements upon a party seeking an order of attachment:

1. a motion for an order of attachment must set forth the nature of the evidence on which the motion is founded as well as the name and address of every holder;
2. Such a motion must be supported by an affidavit;
3. the movant is required to annex to the motion papers an undertaking to compensate the defendant for any damage caused by the attachment *if* the claim were to be rejected;

The movant is required to furnish security, in an amount determined by the court, to similarly indemnify the defendant. (The court may *exempt* the movant from furnishing security, for good cause shown.)

The hearing on a motion for an order of attachment is generally heard *ex parte*; however, the court has the discretion to afford the defendant an opportunity to be heard. When an order of attachment is granted, the defendant (and any holder) may, within 30 days, move for the order to be canceled; such a motion must be made within 30 days of service of the order.

An attachment order may be granted *ex parte before* an action is commenced. When so granted, the plaintiff has seven days to file his lawsuit.

B. Order Restricting Departure from Israel

An Israeli court *may* issue an order prohibiting a defendant from leaving Israel; such an order may be granted if the plaintiff proves that the defendant is about to leave Israel permanently or for a protracted period and that the defendant's absence from Israel may impede the adjudication of the case or the execution of any judgment. Under such circumstances, the court may also order the defendant to deposit his passport with the court, or the court may impose conditions on the defendant's leaving Israel.

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The general rule is that only under exceptional circumstances will an order restricting departure be granted against a defendant who is *not* an Israeli resident.

A motion for an order restricting departure must also furnish security to indemnify the defendant for any damage that might be caused to him due to the inhibition of his right to leave Israel if the claim is rejected.

If the plaintiff proves that delay in hearing his motion is likely to cause the plaintiff irreparable harm or serious damage, the motion may be heard *ex parte*; otherwise, the motion is to be heard in the parties' presence. If an order prohibiting departure is granted *ex parte*, the order must set a hearing date, generally no later than seven days thereafter, to give the defendant an opportunity to be heard.

C. Appointment of Receiver

When a party makes a prima facie case that its trade secrets have been unlawfully taken or used by a party to the action, a court may appoint a receiver to enter the premises of that party (and, under certain circumstances, the premises of a non-party).

PART VIII: SPECIALIZED COURTS

A. Labor Courts

One of the vestiges of Israel's socialist origins is the Labor Court system.

The trial courts for labor disputes are Regional Labor Courts. Appeals are heard by the National Labor Court.

Regional Labor Courts have exclusive jurisdiction over claims between employers and employees arising from the employer-employee relationship; such jurisdiction includes the question of whether an

employer-employee relationship exists (or existed). Such jurisdiction does not include most tort causes of action. One type of tort claim within the jurisdiction of the Labor Courts is tortious interference with contract. Another type of tort within the jurisdiction of the Labor Courts is theft of trade secrets, when such claim arises from an employer-employee relationship.

When an arbitration agreement relates solely to a claim that would otherwise be within the exclusive jurisdiction of the Labor Court, the Labor Court has those powers that a District Court would normally have regarding the administration of the arbitration.

The Labor Court also has its own rules for mediation of disputes. In civil matters, the Labor Court is not bound by the laws of evidence or by most of the Civil Procedure Rules; those provisions of the Civil Procedure Regulations that deal with temporary relief, stay of execution, and service of court documents (including service upon foreign defendants) apply to the Labor Courts.

B. Standard Contracts Tribunal

A specialized court, called the "Standard Contracts Tribunal," adjudicates the enforceability of 'standard contracts' within the meaning of the Standard Contracts Law (1982). Under that statute, several types of provisions in standard contracts are presumed to be "unduly disadvantageous" and, therefore, subject to annulment or amendment by the Tribunal (or by a court). Those types of provisions include:

- (1) a provision that denies or limits a customer's right to make certain pleas before judicial authorities or to take any other legal proceedings – except as part of a customary arbitration agreement;
- (2) a provision designating an unreasonable place of jurisdiction or conferring on the party that drafted the

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agreement the right to choose unilaterally the place of jurisdiction/arbitration; and

- (3) a provision that requires referral of a dispute to arbitration when the party that drafted the agreement has greater influence than the other party on the designation of the arbitrator(s) or the place of arbitration.

C. Restrictive Business Practices Court

The Restrictive Business Practices Court hears appeals of decisions of the Commissioner of Restrictive Business Practices. Such decisions include (a) a finding that a business practice is a restraint of trade, (b) an order preventing a merger, and (c) an order declaring that a company or group is a monopolist.

When the court has decided that a restrictive business practice exists, it is authorized to make any order that it finds appropriate in order to ensure that its decision will be implemented.

PART IX: PROCEDURAL ISSUES REGARDING SPECIFIC CAUSES OF ACTION

A. Claim To Enforce Copyright/Trademark

No claim for infringement of a trademark may be brought unless the trademark is registered with Israel's Trademark Registry. However, even absent registration, the owner of a foreign trademark can generally assert a claim for unjust enrichment for the unauthorized use of a foreign trademark. In fact, even when the trademark is registered with the Trademark Registry and a claim for infringement can be stated, it is common for the plaintiff to assert, in addition, a claim for unjust enrichment. The same can be said with respect to the tort of "passing-off."

A successful claimant in an action for copyright infringement is entitled to injunctive relief as well as damages.

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B. Enforcement of Foreign Judgments

Israel has signed treaties concerning recognition of judgments with the United Kingdom, Austria, Germany, and Spain.

Under the statute that deals generally with enforcement of foreign (civil) judgments, an Israeli court may – but is not required to – recognize a foreign judgment if the party that seeks enforcement proves each of the following:

- (1) the judgment was given in a country that, according to its laws, its courts are authorized to render such a judgment;
- (2) the judgment is no longer appealable. (The finality rule can sometimes be relaxed.);
- (3) the debt that is the subject of the judgment is enforceable in Israel, and the content of the judgment does not contradict Israeli public policy; and
- (4) the judgment is enforceable in the country where it was rendered.

In addition to the above elements, a foreign judgment is generally not enforceable if rendered in a state that, "according to its laws," does not recognize Israeli judgments.

The possibility of attacking a foreign judgment on "public policy" grounds is narrowly construed.

A motion to enforce a foreign judgment may not, generally, be entertained if it is submitted more than five years after the judgment was given.

As a practical matter, Israeli courts routinely recognize foreign judgments if the above elements are proven and none of the statutory

defenses are proven. There are five possible defenses to a motion to enforce a foreign judgment:

- (1) the judgment was obtained through fraud;
- (2) the Israeli court is of the view that the opportunity that was given to the defendant in the foreign court to plead his case and present his evidence, before the foreign judgment was given, was not reasonable;
- (3) the foreign court did not have jurisdiction, under Israeli rules of private international law;
- (4) the foreign judgment contradicts another judgment concerning the same matter between the same litigants, and such judgment is still enforceable; and
- (5) at the time of the filing of the lawsuit in the foreign court, a legal proceeding concerning the same matter between the same litigants was pending in Israel.

In addition to the five defenses enumerated above, a foreign judgment that is likely to harm the sovereignty or security of the State of Israel is not enforceable.

A party seeking to enforce a foreign judgment files a motion to enforce/recognize a foreign judgment. The amount of the court filing fee in such a proceeding is approximately \$200.

The motion must attach a copy of the foreign judgment confirmed by a competent authority of the country in which it was given.

The party opposing recognition of the foreign judgment is required to file a reply to the application within 30 days.

C. Enforcement of Foreign Arbitral Awards

A party seeking to enforce an arbitral award (whether domestic or foreign) files a *motion* to enforce the award. The court filing fee for such a proceeding is about \$200. Such a motion or application must be filed with a District Court, regardless of the amount of the arbitral award. The arbitral award (or a copy authenticated pursuant to Israeli law), signed by

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the arbitrator, must be annexed to the application, as well as the original arbitration agreement (or a copy authenticated pursuant to Israeli law).

Opposition to any motion to confirm an arbitral award must be made by filing a motion to set the award aside.

The general rule is that the District Court may not consider an application to set aside an arbitral award that is filed more than 45 days from the day on which the award was made.

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