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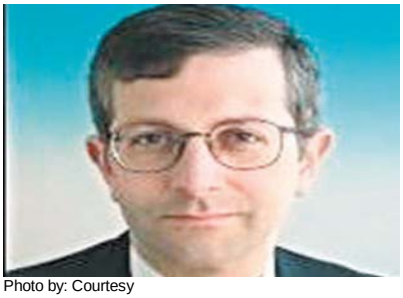
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Solving the court backlog

By ERIC S. SHERBY
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An incentive for businesses to arbitrate: a tax break; the perception in Israel is that arbitration is no more efficient than litigation in court.

Everyone familiar with the Israeli justice system knows that it is extremely overburdened.

One public official who has made a serious proposal to do something about that backload is Justice Minister Yaakov Neeman, who proposed, back in February, a law to authorize Magistrates Courts to send cases to mandatory arbitration.

What is arbitration? Arbitration is, essentially, private judging. Traditionally, retired judges or experienced lawyers serve as arbitrators.

In some industries, it is common to select an arbitrator who is experienced in his field, even if that person has no legal training.

Arbitrators generally are not required to apply the rules of evidence that apply in courts of law, and, almost always, the parties to the dispute are required to pay the arbitrator's fees.

It has been more than half a year since Neeman published his proposal. So far it has been met with little enthusiasm – from the Bar Association, from the president of the supreme court, and from leading Knesset members.

In a nutshell, Neeman proposes that, in order to solve the severe backlog in Israel's courts, (a) Magistrates Courts be authorized (in most civil cases) to compel litigants to submit their disputes to arbitration – regardless of whether the litigants consent to arbitration, and (b) the State would pay the fees of the arbitrators.

Under the current Arbitration Law (and as is the case in most western countries), a court may require a litigant to arbitrate only if that litigant had expressly agreed to do so (usually in an agreement before any dispute arose).

Everyone agrees that something must be done to solve the backlog in our courts.

Therefore, we might have expected the Neeman proposal to be well received. That has not been the case.

Why not? The main objection voiced to the Neeman proposal is that it would be unconstitutional to take away a litigant's access to the court system without that litigant's actual expressed consent.

But there is another reason why the Neeman proposal has not received much support – too many people in Israel simply do not trust arbitration.

In Israel – as in most of the world – an arbitral award is almost never appealable. To a large extent, that

feature of arbitration is considered a good thing. After all, arbitration is supposed to bring a dispute to a final resolution more quickly than proceedings in court. Yet at the same time, many people shy away from arbitration because they loath giving up the right to take their case to an appellate court.

But in most of the western world, the use of arbitration is on the rise – at least in the business context. For example, in the United States, the American Arbitration Association and Judicial Arbitration & Mediation Services (JAMS) have, year after year, reported steady increases in the number of cases filed. The same goes for the International Chamber of Commerce, the World Intellectual Property Organization and the London Court of International Arbitration.

Why does Israel buck the trend? Perhaps because, in Israel, there has not been a tradition of institutional arbitration – arbitration conducted under the auspices of an institution that exists primarily for the purpose of conducting arbitrations (or mediations). (We do have two well respected arbitral institutions – the Israeli Institute of Commercial Arbitration, and the Israeli Bar Association's Arbitral Institution.) The main advantage of institutional arbitration is that, in contrast to ad hoc arbitration, the institution appoints the arbitrator and, to some extent, oversees his/her handling of the case – in particular, the speed with which the case gets resolved.

The lack of a tradition of institutional arbitration has contributed to the perception among Israelis that arbitration is no more efficient than litigation in court.

The Knesset should try to change that perception, and it can start by taking one of Neeman's ideas and using it to encourage businesses to select arbitration.

Because Neeman's proposal includes having the State pay the fees of arbitrators, it is safe to assume that he conferred with the Treasury and calculated how much it would cost to funds dozens (if not hundreds) of arbitration cases.

I am not privy to those calculations, so I cannot know how much the Treasury expects to have to spend if the Neeman proposal were to be enacted. But the minister knows those calculations (at least in general terms), and whatever those numbers are, they can be converted into a tax break to incentivize businesses to arbitrate.

Here's how it would work: • Every year, when a company pays its annual corporation fee, it would have the option to "check a box" to declare that it agrees to submit any business dispute [i.e., one to which the adverse party is another business (a corporation or a partnership)] that arises over the next year to institutional arbitration.

• A company that "checks the arbitration box" will automatically receive a tax reduction (Minister Neeman and the Treasury know, more or less, the amount) for the next twelve-month period.

• When and if such a company is involved in a legal dispute with another business over the next year, the "checking of the box" would constitute an agreement to arbitrate, and the court may send the parties to institutional arbitration without any further consent by the parties.

• Unlike in the Neeman proposal, the state would not pay the fees of the arbitrator.

Rather, the parties would pay those fees – because the state already paid its part of the program via the tax break.

Will this proposal make a difference? Undoubtedly yes. Most of the cases that tie up the court system are not "slip-and-fall" cases or medical malpractice cases. The cases that take years to resolve are, by and large, those that involve huge sums of money, multiple witnesses, and tons of documentation – in other words, business litigation.

If we succeed in moving a significant number of business disputes out of the court system, the system will feel the difference – very quickly.

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