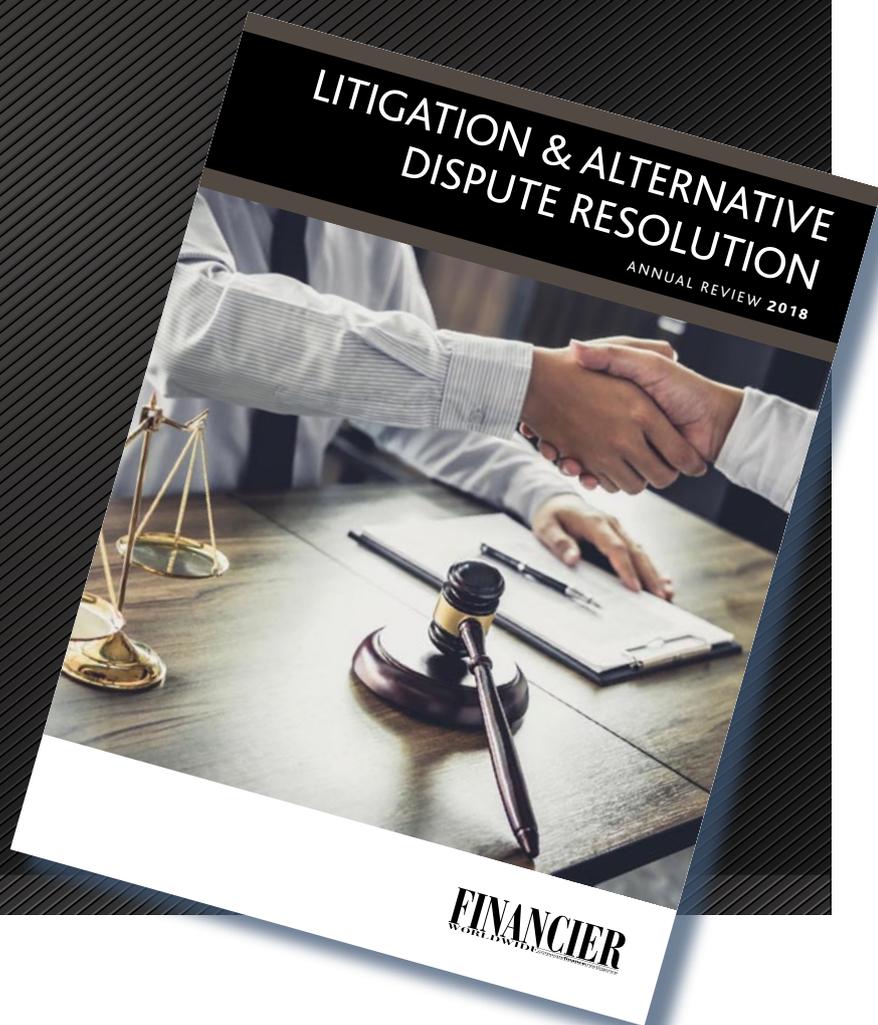


ANNUAL REVIEW

Litigation & alternative dispute resolution

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Ram Jeanne is a founding partner of Amar Reiter Jeanne Shochatovitch & Co., and the managing partner of the firm. He specialises in the representation of clients in complex civil-commercial litigation matters and heads the firm's commercial litigation department. His clients include some of the leading commercial companies in their fields in Israel, including communications and telecommunications, software, retail, real estate and insurance companies, public authorities and public institutions. As well as representing clients in courts and in arbitration proceedings, he also advises on legal disputes overseas, and is himself an arbitrator.

Israel

■ Q. Could you outline some of the current market challenges at the centre of commercial disputes in Israel?

JEANNE: The significant number of class actions, derivative claims and shareholder litigations, in addition to specialised courts exclusively dealing with such claims, contributes to a rapidly changing environment, and to frequent updates of relevant corporate and commercial case law. Practitioners must make sure that they are always up to date and are capable of coping with new and changing legal challenges. Consequently, today, seasoned corporate and commercial litigators are becoming more specialised in this area, and sometimes even focus on specific types of shareholder or class action litigation.

■ Q. What general advice can you offer to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of mediation, arbitration, litigation and other methods?

JEANNE: We believe that before engaging in court or alternative dispute resolution (ADR) proceedings in Israel, it is most important to undertake educated

risk and cost-benefit analyses. In addition to assessing the strength of a claim, companies must choose the right process, whether it is litigation, arbitration or mediation. The important factors for most companies are related to costs, the duration of the process, the resources the company will need to invest, such as management attention, and the confidentiality aspects of the dispute. In addition, companies are sometimes concerned about the enforceability of arbitration awards and their appealability. As it is relatively simple to enforce an arbitration award in Israel, and as a recent amendment to the Israeli Arbitration Law now allows appeals on an arbitration award, more and more companies are inclined to prefer arbitration over the public courts.

■ **Q. To what extent are companies in Israel likely to explore alternative dispute resolution (ADR) options before engaging in litigation?**

JEANNE: ADR proceedings are very common in Israel. They are easily available and supported by both modern legislation and well-developed case law. The availability of arbitration and mediation alternatives, together with the well-

known disadvantages of classic litigation, such as the duration of proceedings, and the lack of control over the identity and specialisation of the judge, makes ADR a viable solution in the Israeli market.

■ **Q. How would you describe arbitration facilities and processes in Israel? Are local courts supportive of the process?**

JEANNE: Arbitration facilities and processes in Israel are modern, developed and correspond with the most advanced international ADR institutions available globally. Some international institutions, such as the International Chamber of Commerce (ICC), have an Israeli branch to support proceedings that take place in Israel. In an attempt to reduce the heavy caseload in the public courts, judges are supportive of parties solving their disputes via alternative measures. Some Israeli laws provide additional incentives to solve disputes through ADR. For instance, in certain cases, the parties are forced to attempt to reach a solution by mediation before advancing their case in court. Also, in the event that a dispute was solved through ADR, in certain circumstances the parties could be entitled to a reimbursement of the court fees they paid.



■ **Q. What kinds of situations or circumstances might lead companies to pursue litigation instead of arbitration?**

JEANNE: Despite the clear advantages of arbitration, in some cases litigation may have significant advantages. First, litigation can be cheaper. While a claimant must pay court fees, arbitrators' fees can be more expensive. Second, the longer duration of the court proceedings could be an advantage for a party who wishes to delay resolution. Third, the public nature of litigation could be used as an advantage or as leverage, when facing a more discreet party. Fourth, in litigation the procedure and evidence rules are stricter and less flexible, which could be an advantage, for instance if it could lead to key adverse evidence becoming inadmissible. Fifth, the possibility of appealing the outcome is broader and does not depend on the other party's prior consent. And finally, certain issues are regarded more favourably in public courts, such as cases which involve mandatory rights and public policy.

■ **Q. What practical challenges need to be dealt with when undertaking complex international, multijurisdictional disputes in Israel?**

JEANNE: International or multijurisdictional cases sometimes pose unique challenges. For instance, when a dispute is managed in several proceedings in parallel, it is important to coordinate the efforts and the arguments made in each jurisdiction. Also, when conducting international proceedings, often the parties need to deal with issues of conflict of laws. In many cases, the contractual substantive law conflicts with the laws in the seat of the arbitration, laws which are sometimes mandatory. For example, it is not unusual to see a dispute concerning a shareholders' agreement which is subject to New York state law, with respect to an Israeli company, which is governed by the Israeli Companies Law, arbitrated in London and subject to English mandatory laws, under ICC rules. The practitioners must know how to reconcile potential conflicts and use them to their advantage. Also, in international arbitration proceedings, parties could come from jurisdictions with different legal systems and approaches. For instance, an Israeli party, which is used to the adversarial legal system, could be facing a continental European party. During the legal proceedings, such differences need to be contained and acknowledged.

“ Courts in Israel interpret dispute resolution and jurisdiction provisions in the same manner that contracts are interpreted under Israeli law. ”

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■ **Q. What considerations should companies make when drafting a dispute resolution clause in their commercial contracts to address the possibility of future disputes?**

JEANNE: Courts in Israel interpret dispute resolution and jurisdiction provisions in the same manner that contracts are interpreted under Israeli law. In this context, if parties wish for a certain jurisdiction, including arbitration, to be exclusive and mandatory, they must state so explicitly and in an unequivocal manner. In addition, we would recommend referring matters to known arbitration institutions, which have a clear and consistent set of rules

and jurisprudence. It is also important to check whether the process of nominating the arbitrator suits the company's interests. Finally, if possible, it may be beneficial to agree on the identity of the arbitrator in advance, both in the first instance and in the appeal. ■

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