CA(L) 9041/05

Applicant: "Imrei Chayim" registered society

v.

Respondents: 1. Aharon Wisel
2. Yoel Krois
3. Bella Krois

The Supreme Court

Before Registrar Y. Mersel

For applicant: Benyamin Schorr

For respondents: Naor Mor

For the Attorney General: Michal Sharvit

DECISION

1. The District Court annulled an arbitration award. A party wishes to appeal that decision in this Court. Section 38 of the

Arbitration Law, 5728-1968 (hereinafter: the arbitration law) determines that a decision made pursuant to that law can be appealed by permission. The party argues before the Registrar of the Court that the appeal should be heard, despite that, as an appeal as of right, since section 17 of Basic Law: Judicature (hereinafter: the basic law) determines that "a judgment of a court of the first instance can be appealed as of right, excepting a judgment of the Supreme Court", and in any case – so it is argued – section 38 of the arbitration law is unconstitutional. In light of these provisions, should it be determined that a party, wishing to appeal a decision pursuant to the arbitration law that was given by the District Court, has the right to appeal to this Court pursuant to the basic law, whereas that is a right that trumps section 38 of the arbitration law, and even leads to its unconstitutionality? That is the question before me.

The Facts and Procedural Stance

2. The Rabbinical Court gave an arbitration award. Respondents submitted an application to the District Court to annul it. In a judgment of July 7 2005, the District Court decided to annul the arbitration award. On August 18 2005 applicant submitted an application for an extension to submit an appeal to this Court (CApp 7798/05). The main reason for the application was that it was unclear, in its opinion, whether appeal of the District Court's judgment in this case is an appeal as of right, despite the provision of section 38 of the arbitration law, and in light of the constitutional provision regarding the existence of the

right to appeal, as provided in section 17 of the basic law. In my decision of August 21 2005 I rejected the application for an extension, stating: "the extension is requested in order to decide the categorization of the proceeding. In that situation, the proper way is for applicant to timely submit the proceeding determined by law – application for permission to appeal, after which its application to categorize the proceeding as an appeal as of right in light of section 17 of Basic Law: Judicature, and not as an appeal by permission, will be heard on its merits. That is so, *inter alia*, in light of the presumption of the constitutionality of the statutory provision whose constitutionality is doubted by applicant". After that decision, this proceeding was submitted, and registered as an application for permission to appeal (on September 22 2005). In its arguments, applicant repeated its argument that the appeal should be heard as an appeal as of right, and not as an appeal by permission, due to the reason stated above. Respondents were asked to respond to that argument of the applicant, and that they did. The Attorney General also announced that he is appearing in the proceeding, and submitted his position in the case.

The Arguments of the Parties

3. Applicant argues, in the application for permission to appeal, that it may appeal the District Court's judgment as of right, by force of section 17 of the basic law. This constitutional provision is normatively superior to the provision in section 38 of the arbitration law, which determines appeal by way of permission only. In light of the contradiction between the provisions in the

two sections, applicant's conclusion is that section 38 of the arbitration law should be declared void, and that it should be determined that appeals of decisions pursuant to the arbitration law be heard solely as appeals as of right. Even if the objective of section 38 is proper, section 17 of the basic law does not have a limitations clause, and in any case there is no way to determine that section 38 of the arbitration law contradicts section 17 of the basic law constitutionally. Applicant further argues that although section 17 of the basic law limits the right of appeal to cases in which the appeal is of a judgment given by the first instance, a decision to annul an arbitration award should be seen, for the purposes of this question, as a judgment given by the first instance, and not as the decision of an appellate instance. The conclusion, according to applicant, is that this proceeding should be heard as an appeal as of right.

4. Respondents, in their response, requested that the applicant's position be rejected, and that it be determined that this proceeding should be heard as an appeal by permission, as provided in section 38 of the arbitration law. According to respondents, well established precedent determines that the right to appeal is not a substantive constitutional right, rather a right that exists only by statutory provision. Furthermore, the provision in section 17 of the basic law should not be seen as of higher normative status than that in section 38 of the arbitration law, as the status of the basic law itself is that of a regular statute, as opposed to Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation. In

addition, argue respondents, the determination in section 38 of the arbitration law, regarding limiting appeals of decisions pursuant to that law to appeals by permission only, is logical, and it has a social objective. The institution known as arbitration was established in order to be a fast, comfortable and cheaper means for resolving disputes outside of the courtroom, and in any case, determining that there is appeal as of right of the decisions of the court on the matter is superfluous and frustrates the proceedings, and, further, a party who consents to arbitration consents, at the outset, to all its characteristics, including the law according to which appeals of judicial decisions on the matter will be appeals by permission only. For these reasons, it was requested that appellant's position regarding the categorization of the proceeding be rejected, and that the hearing of this proceeding continue as an application for permission to appeal.

5. The Attorney General was also of the opinion that applicant's argument regarding the constitutionality of section 38 of the arbitration law should not be accepted. The main reason for that is the view that adjudicative decisions regarding arbitration are not "a judgment of a court of the first instance", which is the only kind that can be appealed as of right pursuant to section 17 of the basic law. Litigation before an arbitrator should be seen as the first litigation between the parties, and the decisions of court regarding arbitration are not decisions of the first instance, and are not, according to section 17 of the basic law itself – subject to appeal as of right. Thus, the constitutional provision in section 17 of the basic law is not contradicted by section 38 of the arbitration law,

and the latter is thus constitutional. It was further argued that in light of the purpose of arbitration, and the precedents determined over the years in many judgments, it is clear that the borders of judicial intervention in arbitration awards must be clearly defined and limited, and thus there is logic in the determination in section 38 of the arbitration law, by which appeal of the decisions of the court pursuant to the arbitration law are by permission only. For these reasons, the Attorney General's position is that the provision of section 38 of the arbitration law is constitutional, and is valid, and, accordingly, that this proceeding should continue to be heard as an application for permission to appeal.

A Preliminary Hurdle

6. Indeed, the proceeding before me is not routine, and it raises questions which are by no means simple. *Prima facie*, the decision is of a question that arises frequently before an appellate court – whether a certain proceeding should be heard as an appeal as of right or as an appeal by permission. However, the argument in this case is different, as it is attached to a question which is much more significant – the question of the constitutionality of section 38 of the arbitration law. Applicant requests not only incidental decision of the validity of a provision of a statute of the Knesset – by way of indirect attack – but also that such decision be made in the framework of the question of the categorization of a proceeding as an appeal by permission or as of right. Indeed, the hurdle which applicant has placed in front of it is high, so high that I found it difficult to determine whether it lifted the burden upon it and that

its arguments should be decided on the merits. Indeed, this proceeding can raise the question of jurisdiction. Even if this is an indirect attack of the constitutionality of a law, it is doubtful whether it is appropriate for the question of the validity of a law of the Knesset to be decided in a proceeding such as this one, regarding the categorization of a proceeding as an appeal by permission, or as of right. For the reasons discussed below, mainly rejection of applicant's position, I found no need to determine hard and fast rules on that issue, and I leave it to future decision. Moreover, it has already been decided, more than once, that an argument regarding the constitutionality of a statute is not a casual argument. A statute benefits from the presumption of constitutionality, and thus, a party arguing unconstitutionality – even at the first stage of the very proof of the constitutional impingement – must lift the burden, and it is a significant burden indeed (*see, e.g.*, HCJ 7111/95 *The Local Government Center v. The Knesset*, 50 PD (3) 485, 496). For this reason, I was of the opinion that there was no cause for extension of the deadline for submitting the proceeding, and that it must be filed as an application for permission to appeal, and that only afterward – if necessary – I would hear applicant's argument regarding the categorization of the proceeding (my decision in CApp 7798/05). Indeed, applicant's arguments on this issue, both in the application for extension and in the application for permission to appeal, reveal that the arguments regarding the unconstitutionality of section 38 of the arbitration law were argued with insufficient basis. Applicant did not clarify the scope of the right to appeal determined in section 17 of the basic law, or whether that right was indeed impinged upon

by the provision in section 38 of the arbitration law. The burden on this point is the applicant's, yet it did not lift it. This burden has special weight in the circumstances of this case, in which what is being requested is in fact a deviation from many precedents of this Court and of other instances, in which it has been determined again and again that appeal of a decision pursuant to the arbitration law is by permission, and not as of right (*see, e.g.* CA 299/82 *Mitler v. Yavna'i Ashdod Ltd.*, 39 PD (2) 470, 471-472; CA 107/84 *Illit Ltd. v. Elco Electromechanic Manufacturing Ltd.*, 42 PD(1) 298, 301-302). *Prima facie*, that reason would have been enough to lead to the complete rejection of applicant's position on the issue. It is also problematic to raise that argument after the arbitration itself was carried out by force of an agreement made at the time that the law on this point was clear to the appellant as well. Nevertheless, in light of the serious nature of the argument and the alleged lack of clarity on the issue, I shall also discuss applicant's argument on its merits.

The Constitutionality of Section 38 of the Arbitration Law

7. Indeed, on the merits as well, and possibly beyond what is necessary for decision of this application, I will say that I found no basis for applicant's argument. In my opinion, section 38 of the arbitration law withstands the constitutional standard stemming from section 17 of Basic Law: Judicature. When an argument regarding the constitutionality of a law arises, the argument must be examined in a number of stages: first, examination whether an impingement, upon a right or a provision anchored in a basic law of

normative supremacy over a regular statute, has indeed been proven. Second, examination whether that impingement – assuming it exists – withstands the conditions determined by that basic law for contradiction of it, and thus whether it is a constitutionally justified impingement or not. Third, if it is found that it is indeed an unconstitutional violation, the question of the appropriate relief in the circumstances of the case arises (*see, e.g.*, HCJ 450/97 *Tnufa Manpower and Maintenance v. The Minister of Labor*, 52 PD (2) 433, 440-441).

Impingement upon a Constitutional Right: The Scope of the Right to Appeal

8. Section 17 of Basic Law: Judicature determines, as noted above, that "a judgment of a court of the first instance can be appealed as of right, excepting a judgment of the Supreme Court". What is to be derived from that provision regarding the existence of a constitutional right to appeal, and the scope of such a right? The point of departure is that Basic Law: Judicature, in and of itself, has supreme normative status, like the other basic laws (*see and compare*: HCJ 212/03 *Herut v. The Chairman of the Central Elections Committee*, 57 PD (1) 750, 755-756; HCJ 3511/02 *The "Forum for Coexistence in the Negev" Registered Society v. The Ministry of National Infrastructures*, 57 PD (2) 102, 106; HCJ 2208/02 *Salame v. The Minister of the Interior*, 56 PD (5) 950; HCJ 8071/00 *Ya'akobovitch v. The Attorney General* (unpublished), and Aharon Barak, *haMa'apecha haChukatit – Bar Mitzvah* [*The Constitutional Revolution – 12th Anniversary*], 1 MISHPAT

VA'ASAKIM [LAW AND BUSINESS] (5764) 3, 30-31). Thus, the provision in section 17 of Basic Law: Judicature is a superstatutory constitutional provision. Indeed, it was rightly stated that the entrenchment of the right to appeal in section 17 of Basic Law: Judicature led to the constitutional recognition of that right (*see, e.g.,* CA 1946/01 *The Fund for Care of Wards v. The Administrator General*, 56 PD (3) 311, 318-319; CA(L) 9572/01 *Dadon v. Weisberg*, 56 PD (6) 918, 921; CA 8935/01 *Friedman v. Nechushtan*, (unpublished); *see further* CA(L) 7608/99 *Lucky Bitsu'a Proyektim (Bniyah) 1989 Ltd. v. Mitzpe Kinneret (1995) Ltd*, 66 PD (5) 156, 163, *and references therein*).

9. Despite the constitutional recognition of the right to appeal, the force of that right, and its scope, are not sufficiently clear (*see* CHEMI BEN-NOON, HA'IR'UR HA'EZRACHI [CIVIL APPEAL] (2d ed. 2004) 61-64). It has been determined more than once in caselaw that the right to appeal is not a natural right or a basic right like the other civil and human rights. Although it is a substantive and not procedural right, when a statute does not grant it, it has no independent existence (*see, e.g.,* CrimApp 3268/02 *Kozli v. The State of Israel*, 57 PD (2) 835, 843; HCJ 1520/04 *Shalem v. The National Labor Court*, 48 PD (3) 227, 232; HCJ 87/85 *Arjoub v. The IDF Forces Headquarters*, 42 PD (1) 353, 360-362). It has even been seen as some as a "privilege" (HCJ 75/85 *supra*, *Goldberg J.* at p. 380). Beside recognition of the institution of appeal as an important institution (*see* HCJ 87/85 *supra*, at p. 363), and the determination that between two interpretations, the interpretation granting the right to appeal should be preferred to

that denying it (*see* CA 8838/02 *Goldhammer v. The Haifa Municipality* (unpublished)), it was also determined that "the normative status of the right of appeal in our system is not a simple question" (CrimA 111/99 *Schwartz v. The State of Israel*, 54 PD (2) 241, 271), and that great caution is to be employed in determining its status and scope (*see, e.g.*, Shlomo Levin, *Chok Yesod K'vod ha'Adam vaCheruto vaSidrei haDin ha'Ezrachi'im*, 35 HAPRAKLIT (5756) 451, 463-464; *see also* CrimApp 3268/02 *supra*, at p. 843). This ambivalence toward the right of appeal is not unique to Israeli law. A comparative glance reveals that only in a limited number of legal systems is there a recognized constitutional right to appeal (*see* SHLOMO LEVIN, TORAT HAPROTSEDURA HA'EZRACHIT – MEVO V'IKRONOT YESOD [THE THEORY OF CIVIL PROCEDURE – INTRODUCTION AND BASIC PRINCIPLES] (1999) 32-33, *and references therein*; CrimA 111/99 *supra*, at p. 272). Express constitutional recognition of the right to appeal exists, for example, in the Polish constitution (Article 78) and in the Slovenian constitution (Article 25). Although in a number of additional countries the right to appeal is recognized in the constitution, that right is only the right of the accused to appeal to a higher instance in criminal proceedings which ended in conviction (*see, e.g.,* the Russian constitution – Article 50(3); the Swiss constitution – Article 32(3)). Nor is there full recognition of the right to appeal in international law, *per se*, rather, mostly, limited recognition of the right of an accused who has been convicted to have his case heard before a higher instance (*see* Article 14(5) of the International Covenant on Civil and Political Rights (1966); Article 2(1) of Protocol no. 7 to the 1950 European Convention for the Protection of Human Rights and

Fundamental Freedoms (of 1984)). Furthermore, in the interpretation of Article 6(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms that determines the right to a fair hearing, it has been determined that the member states have no duty to establish instances of appeal or to grant the right to appeal judgments of the first instance (*see* Tolstoy Miloslavsky v. The United Kingdom [1995] ECHR 25; ADRIAN ZUCKERMAN, CIVIL PROCEDURE (2003) 723-724; JACOBS & WHITE, THE EUROPEAN CONVENTION IN HUMAN RIGHTS (2nd Ed. 1996) 160; *compare* SERGE GUINCHARD, DROIT PROCESSUEL (2eme. ed. 2003) 498-450; HCJ 87/85 *supra*).

10. Against that background, how should the essence of the "right of appeal" recognized in section 17 of Basic Law: Judicature be interpreted? Does the basic law grant a party appeal as of right, as opposed to appeal by permission, of a judgment of the first instance? The answer to that question is complex, and there are elements pulling in both directions. In light of my conclusion below, according to which even if section 17 of the basic law has been contradicted, the contradiction is constitutionally justified, I am not required to decide the question of the essence of this "right of appeal" in section 17 of the basic law, and shall leave it for future decision. I shall however add that the position presented by applicant, according to which section 17 of the basic law includes a party's right to appeal, as of right, every judgment of the first instance, raises questions which are not simple. True, the language of section 17 of the basic law is clear, *prima facie*, and grants parties an appeal as of right (as opposed to appeal by permission).

However, constitutional provisions require interpretation with a wide view (*see* FH 13/60 *The Attorney General v. Matane*, 16 PD 430, 442). There is a purposive-constitutional interpretation of the right of appeal in section 17 of the basic law that can lead to the conclusion that it is not to be seen as granting the individual appeal as of right, but rather the right of access to a higher instance. The "right of appeal" in the basic law, according to such an interpretation, is but the right to bring the case before a higher instance, and not specifically by appeal as of right. It is thus sufficient that a party be able to request that the appellate instance grant him permission to appeal. Thus, a statutory provision granting a party appeal by permission to a higher instance – permission which is granted by the appellate instance – like section 38 of the arbitration law, realizes the constitutional right to appeal, and it should be seen as an "appeal as of right" for the purposes of section 17 of the basic law. What are the reasons behind such a possible interpretation of section 17 of the basic law?

11. Indeed, at the basis of this interpretational conclusion is the trend in the caselaw and literature referred to above, according to which extra caution should be employed regarding the scope of the right to appeal. This trend is based upon the character of the right to appeal, as a right which is not a basic right. It is in line with the partial and limited recognition of the constitutional right to appeal in comparative law. Furthermore, such an interpretative conclusion can also be derived from the objectives behind the idea of appeal. The institution of appeal is important, as it realizes a long list of important interests: it expresses fair adjudication; it reinforces the

fairness and the reasonableness of the decisions of the first instance; it erects a mechanism for review and supervision of judgments of the first instance; it nurtures the public confidence in, and legitimacy granted to judgments; it leads to correction of mistakes (where there are mistakes) – and allows creation of uniform and clear precedents for various courts (*see* BEN-NOON *supra*, at p. 57; HCJ 87/85 *supra*, at pp. 362-363, 372-374; HCJ 1520/94 *Shalem v. The National Labor Court*, 48 PD (3) 227, 232). In light of that, a possible conclusion is that the core of the right of appeal is not appeal as of right specifically, rather the ensuring of a party's access to the higher instance, which can hear the case again (*see* CA 7532/02 *Nissim v. Hotsa'at Modi'in Ltd.*, 57 PD (1) 865, 869; *compare* CA(L) 1441/02 *Perets v. Stern* (unpublished); YORAM RABIN, ZCHUT HAGISHA LA'ERKA'OT KE'ZCHUT CHUKATIT (1988) 140, note 307). According to that line of thinking, the issue of the right of appeal, and the question of the categorization of the proceeding as an appeal as of right or an appeal by permission, are not identical (HCJ 87/85 *supra*, at p. 372). The right to a fair hearing does not necessarily require the existence of an appeal as of right specifically, and the question of the categorization of the appeal – as an appeal as of right or by permission – must be derived on the basis of other considerations, related to the specific proceeding at hand (*see* Fejde v. Sweden [1991] ECHR 43; X. v. Court of Cassation and Review of Criminal Cases (Switzerland, SUI-1998-s-001, 1997)(Reported in BULLETIN ON CONSTITUTIONAL CASE LAW no 2003(2)). Furthermore, this interpretation of the basic law is possible and appropriate not only for these reasons, but also in light of the very problematic nature of applicant's position, according to

which section 17 of the basic law specifically grants appeal as of right. Indeed, it is accepted that between two interpretations, the one according to which the statute is constitutional is preferable to the one which leads to unconstitutionality (HCJ 9098/01 *Genis v. The Ministry of Construction and Housing* (yet unpublished); HCJ 4562/92 *Zandberg v. The Broadcasting Authority*, 50 PD (2) 793, 811). The interpretation offered by applicant casts a constitutional shadow not only upon section 38 of the arbitration law under discussion in the case at hand, but also upon other provisions of law determining that appeal of judgments of the first instance is by permission (*see, e.g.*, The Courts Law [consolidated version], 5744-1984, section 64; section 86(e) of the Knesset Elections Law [consolidated version], 5729-1969; section 62c of the Prisons Ordinance [new version], 5732-1971). The interpretation according to which these provisions are constitutional is the one that should be preferred.

12. However, as noted above, I am aware of the difficulties in that interpretation, both in light of the wording of the basic law, and possibly even in light of other of its possible objectives, including granting special weight to the right of appeal. In light of my conclusion below, according to which the violation of the basic law – to the extent that it exists – is constitutional and justified, I should like, as mentioned above, to leave the question of the scope of section 17 of the basic law for future decision.

13. It should be further noted that the conclusion regarding section 38 of the arbitration law's non-violation of section 17 of the

basic law could, *prima facie*, have been based upon an additional component in the basic law: the determination that the right of appeal is granted regarding "a judgment of a court of the first instance". Indeed, both respondents and the Attorney General argued before me that to the extent that we are dealing with judgments and decisions according to the arbitration law, they should not be seen as judgments of "the first instance", and that a differentiation should be made between judgments which essentially employ the appellate jurisdiction of the court, and judgments whose essence is employment of the original jurisdiction of the court (CA 439/88 *The Registrar of Databases v. Ventura*, 48 PD (3) 808, 814-815; CA 138/78 *The Director of Customs and Excise v. A. A. L. Ltd.*, 33 PD (3) 490, 495). Accordingly, litigation before an arbitrator should be seen as the first litigation between the parties, and the act performed by a court that hears arguments pursuant to the arbitration law should be seen as the act of a court employing jurisdiction of review of the proceeding. True, there is much logic in this position, to the extent that it relates to the difference between a regular hearing that takes place before the court when it is the first to hear the dispute between the parties, and a hearing in which the court hears the dispute after an arbitration award. However, this position is not devoid of problems regarding interpretation of section 17 of the basic law, as it seems that the objective of that provision is to provide an instance of review specifically of judgments of a court (except for the Supreme Court, as provided in the end of section 17 of the basic law), as opposed to other quasi-judicial bodies. And, after all, it is Basic Law: Judicature that we are dealing with. The interpretation offered by

respondents and the Attorney General raises doubt regarding this objective of the right of appeal, if it allows determination that whenever the first court which dealt with the issue employed appellate jurisdiction – including appeal of a body which is not a court – a party has no opportunity to appeal its judgment as of right. Therefore, the question how the term "first instance" in section 17 of the basic law should be interpreted is not simple, and, similar to my conclusion regarding the scope of the right, as determined above, in light of my conclusion that even if section 38 of the arbitration law contradicts section 17 of the basic law said contradiction is justified, I need not decide that issue and can leave it to future decision. For this reason also, I did not see to allow applicant to supplement its arguments on this question (application of January 23 2006).

Justification of Impingement upon the Right to Appeal

14. Even if there is substance to applicant's argument that section 38 of the arbitration law contradicts section 17 of the basic law, that does not, as mentioned above, conclude the constitutional examination. The right to appeal is not an absolute right, rather a relative right which is to be balanced against other rights and interests (*see* CA(L) 7435/05 *Segal v. United Mizrachi Bank Ltd.* (unpublished)). Even though the provision being examined is a superstatutory constitutional provision, that can not lead to the conclusion that it can under no circumstances be contradicted by a regular statute of lower normative status. Indeed, a regular statute can contradict a provision of a basic law, subject to conditions

which that basic law itself determines (*see, e.g.*, section 8 of Basic Law: Human Dignity and Freedom; section 4 of Basic Law: Freedom of Occupation). And what is the law if the basic law does not contain a provision like a limitations clause, regarding contradiction of it? Applicant argued before me that in such a situation, there is no possibility of contradicting a provision of a basic law. I cannot accept that position (*see further and compare*: Hillel Sommer, *miYaldut la'Bagrut: Sugiot Ptuchot baYisuma shel haMa'apecha haChukatit* [*From Childhood to Maturity: Outstanding Issues in Implementation of the Constitutional Revolution*], 1 MISHPAT VA'ASAKIM [LAW AND BUSINESS] (5764) 59, 62-65; Barak *supra*, at pp. 30-33; *see also* Ariel C. Bendor, *Arba Ma'apechot Chukatiot?* [*Four Constitional* [*sic*] *Revolutions?*], 6 MISHPAT U'MIMSHAL (5763) 305, 306-307). In my opinion, the precedents on the issue are clear, and the conclusion that arises from them is that where there is no express limitations clause in a basic law, or another provision exhaustively arranging the possibilities of contradiction of a basic law by a regular statute, the provisions of the basic law can nonetheless be contradicted, provided that the contradiction fulfills the conditions of the "judicial limitations clause", primarily that the contradicting statute befits the values of the State of Israel as a Jewish and democratic state; the existence of a proper objective; and an infringement that does not exceed the necessary minimum (*see* HCJ 212/03 *supra*, at p. 107; EA 92/03 *Mofaz v. The Chairman of the Central Elections Committee*, 57 PD (3) 793, 810; HCJ 3434/06 *Hofnung v. The Chairman of the Knesset*, 50 PD (3) 57, 76). This conclusion is also called for in light of considerations of constitutional harmony

(*see* AHARON BARAK, SHOFET BE'CHEVRA DEMOKRATIT [A JUDGE IN A DEMOCRACY] (2004), at pp. 351-353). Against this background, section 17 of the basic law regarding the right to appeal – that doesn't include an express limitations clause – should be read as allowing contradiction of it by a regular statute that fulfills the conditions of "the judicial limitations clause" (*compare* BARAK (2004) *supra* at p. 352).

15. Does section 38 of the arbitration law fulfill the conditions of "the judicial limitations clause" of section 17 of Basic Law: Judicature? My answer is affirmative. Indeed, even if it should be determined that limitation of appeal of decisions according to the arbitration law exclusively to appeal by permission constitutes a contradiction of section 17 of the basic law – and, as aforementioned, it is questionable if that is so – such contradiction fulfills the conditions of "the judicial limitations clause", and thus section 38 of the arbitration law passes the constitutional test. It is not argued before me that section 38 of the arbitration law is at odds with the values of the State of Israel as a Jewish and democratic state. Regarding the condition regarding proper objective: that condition it indeed fulfills. Indeed, at the basis of the restriction of appeal of decisions regarding arbitration exclusively to appeal by permission stands a proper objective which fulfills an important social interest (*see* CA 4886/00 *Gross v. Keidar*, 57 PD (5) 933, *Procaccia J. at pp.* 942-945). That objective is a derivative of the special objective of the institution of arbitration. It is based upon the assumption that there is benefit for

the parties, as well as for the wider public interest, in resolving disputes on the basis of agreement, outside of the courtroom. It assumes that the efficiency of such resolution and the incentive to turn to such resolution are conditional, *inter alia*, upon the ability to conclude the dispute relatively quickly, with very well defined and limited involvement of the courts in the proceedings themselves and their results (*see* CLA 125/68 *Shachav v. Shachav*, 23 PD (1) 16, 19-20 *Berenson J., and* SMADAR OTTOLENGHI, BORERUT – DIN VE'NOHAL [ARBITRATION – LAW AND PROCEDURE] (4th ed. 2005) 3-5, *and references therein*). It is for good reason that the causes for intervention in arbitration proceedings were defined clearly in the arbitration law. It is for good reason that the court usually does not interfere in the arbitration process or in its results. It is for good reason that intervention of the appellate instance in decisions of courts regarding arbitration are also limited (*see* CA 4886/00 *supra*, at p. 943; *and* CApp 427/62 *Amir Biyaf Ltd. v. Chananya Yitschaki u'Banav Ltd.*, 16 PD 1958, 1960; CA 823/87 *Dania Sibus v. S. A. Ringel*, 42 PD (4) 605, 612; LCA 1999/02 *Ilax (Yisrael) Ltd. v. D. S. M., Construction and Development Ltd.* (yet unpublished)). In any case, against the background of this important objective, the provision of section 38 of the arbitration law, which limits the possibility of appealing decisions pursuant to the arbitration law to appeals by permission only, realizes a proper objective. It advances the efficiency of the institution of arbitration, and the advantages that stem from it. It grants weight to the agreement between the parties. It reflects the fact that the very heart of arbitration is resolution of the issue outside of the courtroom.

16. Even if the objective of section 38 of the arbitration law is proper, the question whether the impingement is not excessive also needs to be examined. This examination is carried out according to the three tests of proportionality, regarding a rational link between the means and the objective; a lack of a less impinging means that realizes the same objective; and the existence of a proper relationship between the benefit stemming from the impingement and the harm it causes (*see, e.g.* HCJ 1715/97 *The Investment Managers' Bureau in Israel v. The Minister of Finance*, 51 PD (4) 367, 392-393). According to these tests, it is not difficult to determine that the restriction of the possibility of appealing a decision pursuant to the arbitration law exclusively to appeal by permission is a proportional impingement upon the constitutional right of appeal: first, the means chosen – restriction of the possibility of appealing to appeal by permission only – is rationally linked to the objective, which is preserving the objective of the institution of arbitration, of making the arbitration process more efficient, and realizing the interest of the parties and of the public at large in resolving the issue, to the extent possible, without judicial intervention. Second, *prima facie*, there is no less impinging means that can realize the same objective. *Prima facie*, the spectrum of possibilities that stood before the legislature regarding the possibility of appealing decisions pursuant to the arbitration law was either to completely reject the possibility of appealing to an appellate instance; allowing appeal by permission only; or allowing appeal as of right. Appeal as of right would, as aforementioned, frustrate the proper purpose of making the

arbitration procedure efficient and preserving its framework as a proceeding whose essence is decision of the dispute outside of the courtroom (*see* CA 4886/00 *supra*, *ibid*). Appeal by permission is a means which impinges less than the more severe alternative – which, *prima facie*, the legislature could have chosen – of rejecting the possibility of appeal of decisions of courts pursuant to the arbitration law. No other less harmful means which could still realize the same objective was argued before me. The conclusion is, therefore, that the means chosen in section 38 of the statute also fulfills the proportionality condition of a lack of a less harmful means that realizes the same objective. Last, there is a proper relationship between the benefit in limiting the possibility of appeal to appeal by permission only, and the *prima facie* harm to the party to whom appeal as of right is not granted. The party's ability to turn to a higher instance is preserved in this arrangement, and the appellate court can examine the circumstances of the case and decide whether to grant permission to hear the arguments as an appeal or not. At the same time, the need to attain permission ensures that the legal proceedings related to arbitration will be shorter than regular proceedings, and that the objective at the basis of the institution of arbitration will be preserved, as aforementioned. The conclusion, therefore, is that section 38 of the arbitration law also withstands the third subtest of proportionality, regarding a proper relationship between the benefit from the means and the harm caused by it.

Result

17. My conclusion is therefore as follows: applicant's application to determine that it has the right to appeal the judgment of the District Court in light of section 17 of Basic Law: Judicature, despite the clear provision of section 38 of the arbitration law is rejected: first, *prima facie*, applicant did not lift its burden in arguing the unconstitutionality of a statutory provision of the Knesset, especially in light of the doubts regarding the interpretation of the scope of section 17 of the basic law. Second, even if section 38 of the arbitration law contradicts section 17 of the basic law, that contradiction is for a proper purpose and is not excessive. In light of that, my conclusion is that applicant's argument regarding the unconstitutionality of section 38 of the arbitration law is rejected, and thus its argument regarding its entitlement to file an appeal specifically as an appeal as of right cannot be accepted. The proceeding shall thus continue to be heard as an appeal by permission, as determined in section 38 of the arbitration law. I make no award of costs for this application.

Given today, 1 Shvat 5766 (Jan 30 2006).

Yigal Mersel, Judge
Registrar