

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

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ISRAEL

Responses submitted by:

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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

The Israeli jurisdiction is basically a common law jurisdiction, though it has several civil code jurisdiction features, such as reliance on codification and not only on precedents.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

The method used in the Israeli jurisdiction is adversarial.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Legal claims in Israel are determined by judges that are appointed by the Judicial Election Committee. The Committee is assembled of representatives of the Supreme Court; representatives of the Israeli Bar Association; a representative of the Israeli Parliament (the "Knesset"); a minister of the Israeli Government; and chaired by the Israeli minister of justice. In general, a candidate to be appointed as a judge must be an Israeli citizen that has a law degree and has been working as an attorney, a law professor or in an adjudicatory role for at least 5 years, of which at least 2 were in Israel.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

Yes. Mainly: Labor Court; Family Court; Administrative Court and the Financial Court.

5. Is arbitration an option and when? If so, what rules are typically used?

There is no obligation to attend an arbitration proceeding in the Israeli law, unless the parties actively agree to it, whether in advance or after the conflict had occurred.

The proceeding shall be conducted in accordance with the Arbitration Law and the arbitrator shall not be bound to evidentiary rules or to material law, unless otherwise agreed by the parties.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Yes. In general, Courts tend to enforce arbitration agreements.

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7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

There is no obligation to attend a mediation proceeding in the Israeli law at any stage. However, in most of the Magistrate Courts in Israel there is an obligation to attend an IAC meeting (Information, Acquaintance and Coordination) in order to examine the possibility of resolving the conflict by way of mediation.

8. What is the process for pre-hearing fact discovery (if any)?

(a) Are there provisions for mandatory document disclosures?

The court may order the parties to conduct disclosure of documents at its discretion or subject to a party's request. In practice, courts usually order the parties to conduct discovery proceedings. Once the court has ordered a disclosure of documents, the parties must comply.

(b) Is there provision for oral examinations of the parties or others?

No. Parties and witnesses' examination is made during trial, unless there are exceptional reasons that might prevent examination during trial, and on such event the court may order examination of witnesses prior to trial.

(c) Are there limits on the length of oral examinations?

No.

(d) Are witness statements or summaries to be provided before the hearing?

Yes. Parties must file all chief affidavits prior to trial.

9. What is the process for pre-hearing expert disclosure (if any)?

(a) Are expert reports or written summaries required to be exchanged?

Yes.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

No. Experts' examinations are made during trial.

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(c) *Are there provisions requiring experts to meet and narrow issues before the hearing?*

No.

10. Are there other notable discovery rules?

One of the most notable provisions states that any document that was not disclosed during discovery shall not be filed as evidence during trial.

Another notable provision relates to a party's disobedience to court's order on document disclosure: should this party be the plaintiff, its statement of claim shall be deleted and he shall have to repeat the filing of the claim; should this party be the defendant, its statement of defense shall be deleted and the court would determine the claim as if no statement of defense was filed.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

Yes. Pre-trial in Israel is conducted by a judge and is meant to examine the possibility of resolving the conflict by a compromise and additionally for an initial inquiry of the conflict, including a dismissal of the claim when necessary.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

Yes, Israeli law allows a motion to *dismiss in limine* to be filed by a defendant. Accordingly, a claim can be dismissed by the court either with or without prejudice.

A dismissal without prejudice shall occur when: the claim does not show any cause of action; the claim is vexing; the value of the claim was deficiently assessed or court fees were not paid by the plaintiff. Such dismissal does not prevent the plaintiff from filing the claim again.

A dismissal with prejudice shall occur when: a claim on the same matter and between the same parties was already determined; the claim is invalid due to limitation rules; the claim was filed in delay; filing the claim is an abuse of legal process; one of the parties is ineligible to file a legal claim or to be sued; the claimed conflict is not between the said parties (absence of rivalry); the court that the claim was filed to is not certified to discuss the claim (courts do not tend to reject a claim on this ground).

Such dismissal would be considered as *res judicata*, and would prevent the plaintiff from filing the claim again.

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13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

No such process with respect to evidence admissibility exists. However, in a criminal trial it is possible to conduct "a trial within a trial" with respect to a defendant's admission that shall take place separately, either before or after the start of the trial.

14. What is the standard for admissibility of expert evidence?

An expert opinion would be regarded as *prima facie evidence* to the veracity of its content. The court is not bound to the expert's conclusion and has the discretion to decide whether to base its judgment on it, or not.

In principle, an expert should have formal education in the professional field of the required opinion, but this is not a mandatory requirement and an expert might be a person who acquired his knowledge by informal means. It is in the court's discretion whether to accept the opinion as an expert opinion or not, based on the expert's professional background. Israeli courts sometimes rely on the U.S. *Daubert* standard for this purpose.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Yes. The appointment of a court expert is at the court's discretion, whether the parties agree to the appointment, or not. Additionally, in claims that are submitted in accordance with the Law for the Compensation of Traffic Accident Victims, it is mandatory to appoint a court expert.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Yes. Some of the privileges are absolute, i.e., court has no discretion with respect to the removal of the privilege, while others are relative, i.e., their removal is discretionary. Following are the privileges that exist in the Israeli law:

- Attorney – Client Privilege: absolute privilege. Removal of the privilege at the client's discretion;
- Doctor/Psychologist/Social Worker – Patient Privilege: relative privilege. Removal of the privilege is subject to patient's or court's discretion;
- Religion Priest Privilege: absolute privilege. Removal of the privilege is subject to the priest's discretion;
- Journalist – Source Privilege: relative privilege. Removal of the privilege is subject to source's or court's discretion;
- Bank – Client Privilege: relative privilege. Removal of the privilege is subject to client's or court's discretion;
- Privilege in favor of the State or the Public: relative privilege. Removal of the privilege is subject to court's discretion;
- Privilege from Self-Incrimination: this privilege is somewhere in between absolute and relative. Removal of the privilege is subject to the interrogated person or the witness' discretion, but court can force a person to answer a question though the reply might be incriminating, and grant this person privilege from usage, i.e., his answer would not be held against such person, without his or her approval.

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- Compromise and Negotiation Documents: relative privilege. Removal of the privilege is subject to the parties' mutual consent or to court's discretion
- Work Products (documents that were prepared for litigation purposes) Privilege: relative privilege. Removal of the privilege is subject to client's or court's discretion
- IRS Investigation Privilege: this privilege applies to attorneys where an IRS investigation is conducted against a client of theirs and are required to file all relevant documents. Should an attorney raise a privilege claim with respect to a certain document, the IRS officer shall insert the relevant document into a closed envelope without reviewing it, and subject to the attorney's request, a judge shall review the document and determine whether it is privileged;
- Privilege of Testimony before a Governmental Commission of Inquiry: this privilege shall not apply in a criminal proceeding that is conducted due to the testimony ;
- Privilege of a Trade Secret: under certain conditions and subject to its discretion, the court may apply this privilege on evidence that might reveal a trade secret.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

Privilege is protected. In addition, the Israeli law applies the protection of privacy on investigation products that were obtained during an invasion of privacy. The application of this protection is subject to court discretion and to the offended person's consent to reveal the evidence despite the invasion of privacy. Additionally, the Israeli law includes several exemptions and protections from this rule under which, the protection of privacy would not apply.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

As mentioned in the answer to question no. 16, in the event that a relative privilege applies, the removal of such privilege is subject to the court's discretion. When a privilege in favor of the state applies, the determination shall be made by a Supreme Court judge.

19. Briefly describe the trial process?

(a) *Are there opening submissions, in what form and of what length?*

No.

(b) *What is the order of presentation of witnesses?*

In civil procedure:

The examinations start with the plaintiff's witnesses and end with the defendant's witnesses.

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In criminal procedure:

The examinations start with the prosecution's witnesses and unless is determined there is no case to answer, continue with the defendant's witnesses.

(c) Who conducts examination and in what order?

The examinations are conducted by the attorneys of the parties. However, judges may ask questions, at their discretion. The order of examinations is as follows:

In civil procedure:

Each witness is examined by the attorney of the party that summoned him, then the witness is cross-examined by the counterparty and finally a redirect is conducted by the attorney of the party that summoned the witness.

In most proceedings, chief affidavits replace the direct examination.

In criminal procedure:

As in the civil procedure, the order of examination of a witness is direct examination– cross-examination – redirect. No chief affidavits are allowed in criminal procedure.

(d) What is the process for closing submissions?

First to be filed are the plaintiff's summations, then the defendants summations and finally the plaintiff's response.

20. Please identify any other notable trial procedures.

None.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

The burden of proof is imposed on the plaintiff /prosecution.

In civil procedure the court determines the claim according to the balance of probabilities, i.e. the standard of proof is 51%.

In criminal procedure the prosecution must prove that the defendant is guilty beyond reasonable doubt, i.e. the standard of proof is 98%.

However, the following rules in Israeli law enable the transfer of the burden of proof to the defendant:

- Confession and Avoidance: in civil procedure, when the defendant admits the facts claimed by the plaintiff, but asserts that there are other reasons that prevent the plaintiff from receiving the claimed relief, the burden of proof is transferred to the defendant.

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- Evidentiary Damage: in civil procedure, when due to a deliberate or negligent act or a default of the defendant, the plaintiff's ability to prove his claim was harmed, then the burden of proof is transferred to the defendant.
- Presumptions of Law: in both civil and criminal procedures, certain Israeli laws apply presumptions that may transfer the burden of proof to the defendant such as *Res ipsa loquitur* or when damage was caused by a dangerous thing that the defendant was in charge of.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

Compensatory damages are recoverable in the Israeli law. Pre-judgment interest is also recoverable and courts would usually award the actual amount that is due, i.e. including the interest. Punitive damages were recognized by case law, but courts tend to avoid awarding them.

The Israeli law also recognizes non-pecuniary damages with respect to pain and suffering; loss of the enjoyments of life; violation of one's autonomy; damage to reputation and more.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

The threshold for recovery with respect to punitive damages would be when the court is interested in deterring the public with regard to the said act, or to express its aversion to the act and to stress that the act is a non-normative act. As mentioned above, courts tend to avoid awarding such damages and therefore there is not enough empiric data to assess the range within which such damages may be given.

24. Are there time limits for bringing claims? Responding to claims? Please describe.

The Israeli Statute of Limitations sets time limits for filing civil claims according to the subject of the claim and other circumstances (usually 7 years). Other laws also set time limits with respect to specific matters like insurance contracts or protection of privacy. The Israeli Torts Law states that although the limitation period starts from the day that the injured person discovered about the negligent act, the claim shall become invalid within a maximum 10 year period.

Normally, the statement of defense needs to be filed within 30 days of the service of the statement of claim.

The Israeli Criminal Procedure law sets time limits for prosecuting a person according to the maximum punishment set with regard to the relevant criminal offense and other circumstances.

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25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

Jurisdiction over a foreign defendant shall be established according to one of the following alternatives:

- Jurisdiction Clause: when the parties agree to grant jurisdiction to Israeli courts, either before or after the conflict arose, this, in general, shall grant the Israeli forum jurisdiction over the dispute, even when the defendant is foreign.
- Service within Israeli territory: when a statement of claim is served to a defendant within the Israeli territory, the Israeli forum obtains jurisdiction over the dispute. This also applies when the statement of claim is served to an authorized representative of the defendant.
- Leave to Effect Service Outside the Jurisdiction: under certain requirements, mainly that the Israeli territory is relevant to the claim, the court shall grant a plaintiff leave to effect service outside the territory of Israel and the claim shall be heard before an Israeli court.

Forum Non Conveniens: In general, Israeli courts shall hear any claim that was served subject to one of the above mentioned alternatives. However, the Israeli courts have the discretion to decide that there is a more convenient forum to discuss the claim, and therefore, to dismiss it *in limine*.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

The Israeli law enables a defendant to file a third party notice whenever it deems that another party is liable for the claimed damage.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

Costs are subject to court discretion and are not mandatory. However, courts usually tend to reward the winning party costs, though not the actual costs incurred, but rather a reasonable amount that the court deems fit.

28. Are contingency fees allowed?

Contingency fees are allowed only in civil cases.

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29. Is third party funding of claims permitted? Under what circumstances?

A third party is allowed to finance the proceeding. Additionally, an assignment of rights to a third party is also possible according to the Israeli law.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

The Class Actions Law enables a group of plaintiffs to file a class action, provided that the subject of the claim is: consumerism; insurance; banking; antitrust; securities; environmental hazard; discrimination; accessibility and equality with respect to disabled people; unlawful collection by a state authority; illegal advertisements and pension payments.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Yes, a class action may be filed by organizations, provided that the organization's field of activity is relevant to the subject of the action.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

The average minimum period would be 1 year, though simple cases might reach trial in a shorter time. Most claims take several years, mainly due to the many motions that are usually filed in each proceeding which cause significant delay of the process before trial.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

An appeal process is available and generally, an appeal shall be filed to a higher court than the court granting the judgment. An exception is when an interim decision is made by a court registrar. In such event, the appeal shall be filed to a judge of the same court.

When an interim decision is made by a judge, the right to appeal is not automatic and the party wishing to appeal must file a motion for leave to appeal.

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34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Electronic trials do not exist. With respect to video conference testimonies, courts don't easily allow them. Electronic evidence can be presented in court and should a party wish to present evidence that requires a visual aid, it must notify the court at least 3 days prior to the hearing.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

Usage of such elements is not generally practiced.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

No such distinction exists. An attorney usually represents a client during the whole proceeding, i.e. pre-trial and trial, many times even in the appeal, provided that both the client and the attorney are interested.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

Subject to court discretion, compensation can be decreased once it was established that the plaintiff was contributory negligent.

In the event that several defendants are liable for the claimed damage, the default is that they be held liable jointly and severally. However, if it is possible to divide portions of the damage between defendants, then each defendant may be liable only to its own part of the damage.

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

Due to the fact that Israel signed and ratified The Hague Convention, service of a complaint that was filed outside Israel can be made in accordance with the convention's provisions. It is to be noted: the state of Israel has declared a reservation from paragraphs B and C of article 10 of the Hague convention, and therefore the service of a complaint issued outside of Israel can be made either by registered post or through the director of the courts (the Central Authority for purposes of the convention).

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39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

Generally no. However, when evidence are obtained by virtue of the Israeli Law of Legal Assistance Between States with respect to a criminal matter, the evidence shall be transferred to the state that sought the legal assistance, only provided that this state has committed that the evidence shall be used solely for the purpose of that criminal matter, unless otherwise approved by the State of Israel.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

None.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

None.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

During the past year, the Israeli Ministry of Justice is preparing new civil procedure regulations. Subject to their approval and entry into force, many alterations are expected in the Israeli civil procedure, including the form of filing legal claims.