

EXPERIMENTING WITH ALTERNATIVE DISPUTE RESOLUTION AS A MEANS FOR PEACEFUL RESOLUTION OF INTEREST LABOR DISPUTES IN PUBLIC HEALTHCARE—A CASE STUDY

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I

INTRODUCTION

On the morning of May 27, 2000, as Israel's nationwide doctors' strike was entering its eleventh week, the Prime Minister convinced the doctors' union to try mediation in order to reach an agreement. This marked the beginning of an unprecedented experiment with Alternative Dispute Resolution (ADR) as a means of peaceful resolution of labor disputes in public healthcare. The experiment began with a long and highly volatile crisis mediation,¹ which turned into strategic or preventive mediation, followed by a ten-year period under a voluntary no-strike arbitration regime ending in July 2010.

This case study describes, discusses, and analyzes the no-strike arbitration in action, assessing its value, promise, and limitations. Drawing upon in-depth interviews² with the arbitrators and the parties' representatives and counsels, as well as upon the extensive litigation and transcripts of the arbitration proceedings and award, this case study emphasizes the process-oriented aspects of the arbitration. It also distills and analyzes more general insights and lessons, and highlights their broad, policy-oriented implications.

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1. See THOMAS A. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS FROM THEORY TO POLICY AND PRACTICE* 287 (1980) (explaining the distinction between crisis mediation and preventive or strategic mediation).

2. Altogether, there were eleven non-structured interviews. Interviewees were promised not to be cited or identified in the text. Interview notes are on file with the author.

II

BACKGROUND—THE LABOR-RELATIONS TERRAIN, THE STRIKE, AND THE MEDIATION

A. The Labor-Relations Landscape

Israel has been described as a “labor state”—a state run by a labor movement.³ At one time, the rate of unionization was as high as eighty-five percent; the present rate is approximately thirty-four percent.⁴ One union, the Histadrut, represents practically every unionized worker in Israel.

Like other professionals, doctors are highly unionized. More than ninety percent of all doctors employed by hospitals and clinics in Israel belong to a union. In contrast to almost all other white-collar employees represented by the Histadrut, doctors and certain other professionals⁵ belong to independent unions. Doctors are represented by a single union, the Israel Medical Association (IMA).

The IMA’s constituency is highly heterogeneous. It represents many members with different and sometimes conflicting interests. First, the IMA is a federation of two unions: the Association of State Doctors and the Association of the General Health Services Doctors. The latter represents two distinct populations—doctors who work in hospitals and doctors who work in clinics. Second, the IMA represents all levels of doctors—from interns to hospital general managers—within a single union and one bargaining unit.

Medical care in Israel is predominantly public and semi-public. Although private medicine has been expanding in recent years, it serves only a small fraction of the population. Medicine is dominated by two large employers: the Histadrut-affiliated provider General Health Services (Clalit) and the state. Clalit is the primary provider of healthcare to more than half of Israel’s population. It owns and runs sixteen hospitals and 206 health-maintenance organization (HMO) clinics, and employs two-thirds of the 16,000 members of the IMA. The state runs twenty-one hospitals and twelve mental-health centers. In addition, several hospitals are owned by the municipalities of Tel Aviv and Haifa and by non-profit associations, as well as several hundred clinics run by two other medium-sized, semi-public HMO-type providers of medical services.

3. The expression “Labor State” was meant to reflect the unique role of the largest labor union—the Histadrut—in the history of the new nation. The Histadrut was founded in 1920, twenty-eight years before the State of Israel. It functioned as a government in anticipation of a government, and amassed enormous economic and political power and influence. NADAV SAFRAN, *THE UNITED STATES AND ISRAEL* 84 (1963). Since statehood, the Histadrut has historically been party to all economic and social-welfare initiatives of national concern.

4. Yitchak Haberfeld, Yinon Cohen, Guy Mundlak & Yitchak Saporta, *Union Density in Israel 2000–2006: Years of Stagnation*, 12 *LAB., SOC’Y & L.* 1, 5 (2009).

5. These professionals include journalists, teachers, university professors, and research employees at the Defense Ministry.

Doctors' salaries and working conditions are governed by a nationwide multi-employer collective agreement,⁶ traditionally signed by the IMA on the one hand and the major employers on the other. The other employers in the industry either join the agreement⁷ or follow the nationwide agreement norms as "units of direct impact."⁸ The chief negotiator representing the employers is the Director of the Wage and Labor Agreements Division, a division of the Finance Ministry that administers and enforces the wage-control program. Since 1985, the public sector in Israel has been under strict wage control. Employers in the public sector are not allowed to increase wages or benefits to employees either collectively or individually without the consent of the Director.

Considering that the state is the second largest healthcare employer and that all major organizations that employ doctors are funded by the state,⁹ the Director of the Wage and Labor Agreements Division plays a leading role in contract negotiations when changes to doctors' wages or benefits are being sought.

The Director of the Wage and Labor Agreements Division is not always alone in the leadership seat. Since 1995, another division in the Finance Ministry—the Budget Division—has been increasingly active in labor contract negotiations. From time to time, when both the Director of the Wage and Labor Agreements Division and the relevant minister have been politically or professionally weak, the Budget Division has taken the lead as chief negotiator.

B. The Strike of 2000

In March 2000, the IMA called a strike of all doctors in the hospitals and HMO-type clinics in Israel. The union's collective agreement had expired in 1998 and the parties had been negotiating for two years with no progress. The IMA had not anticipated the negotiations to be so protracted and difficult; in the previous round of negotiations in 1994, it had been able to convince the Finance Minister to agree to a sixty-percent salary increase with minimal pressure. This time the IMA had asked to double hourly pay, overhaul the compensation package, and, as an interim measure, expand the salary base used for calculating all benefits, including pension, on-duty, and on-call payments. The goal was to end the perceived incongruence between doctors' investment in schooling, level of responsibility, status, and difficult working conditions, on the one hand, and their low hourly wage, on the other. When the negotiations failed

6. This type of collective agreement is common in the public sector and is referred to in the case law as a "pluralistic special collective agreement." See LA 4-12/83 Histadrut v. Ports Authority 17 PD 18 [1983] (Isr.); LA 4-15/85 Union of Academicians in Humanities & Soc. Sciences. v. State of Israel 18 PDA 113 [1986] (Isr.).

7. The Collective Agreements Law of 1957 provides special procedures for joining a collective agreement. See Collective Agreements Law, 5717-1957, 11 LSI 58, 59 (1957) (Isr.).

8. Arnold R. Weber, *Stability and Change in the Structure of Collective Bargaining*, in CHALLENGES TO COLLECTIVE BARGAINING 13, 14 (Lloyd Ulman ed., 1967).

9. Thus falling under the definition of "public sector" for the purpose of wage-control legislation. See Budgetary Principles Law, 5745-1985, 39 LSI 61, 75 (1985) (Isr.).

to change this incongruence, the IMA called a strike, which had been planned and prepared in advance.¹⁰

Because private medical care serves only a small fraction of the nation, the strike had a devastating impact on the public at large. As the strike continued, suffering mounted and public outcry grew; there was enormous pressure on the government to intervene, either by ordering the Finance Minister to accept doctors' demands or by invoking emergency regulations compelling doctors to return to work.¹¹

At the same time, the IMA considered ways to escalate the strike. In Israel, doctors' strikes are rarely full strikes; this was no exception. The IMA had not actually taken the extreme step of calling for a total walkout. Instead, it engaged in a partial strike in which once a week the doctors worked with a skeleton crew on a rotating basis and in various locations. In addition, they performed only life-saving operations and severely curtailed services in outpatient clinics. Although the doctors were praised by Government officials and the media for conducting a noble and moral strike,¹² the IMA felt its reluctance to further endanger patients' health was being mischaracterized by the Finance Ministry to harden the government's position. Hence, the union threatened a total walkout, which would have left only skeleton crews at hospitals to deal with extreme emergencies.¹³

C. Mediation in Action: From Crisis to Strategic Mediation¹⁴

By May 27, 2000, the doctors had been on strike for more than ten weeks. The Prime Minister asked the parties to enter mediation to be conducted by a

10. See MORDEHAI ALON, *THE POWER OF NEGOTIATING—FROM STRIKE TO ARBITRATION* 37–47 (2009) (offering a full account of the IMA's preparations and the strike).

11. Under Article 9 of the Law and Administration Ordinance of 1948, the government may authorize the Prime Minister or any other minister to issue emergency regulations in the interests of the defense of the state, public security, and the maintenance of supplies and essential services. Law and Administration Ordinance, 5708–1948, 1 LSI 7, 8 (1948) (Isr.). The emergency regulations usually authorize government officers or managers in both public and private undertakings to issue specific back-to-work orders on an ad hoc basis under which particular employees or groups of employees are temporarily denied the freedom to strike. Mordehai Mironi, *Back to Work Emergency Orders; Government Intervention in Labor Disputes in Essential Services*, 15 HEBREW U. L. REV. 350, 350–88 (1986). According to one source, it was the Prime Minister who opposed the initiative to issue back-to-work emergency orders. ALON, *supra* note 10, at 88.

12. ALON, *supra* note 10, at 98, 128, 174–75. The strike was nicknamed a “Chocolate Strike.” *Id.* at 176.

13. To prevent the government from relocating the doctors back to work through emergency orders, the IMA considered sending all the anesthesiologists to Cyprus, leaving all operating rooms idle. The underlying idea was that there were only 400 anesthesiologists and that the emergency back-to-work orders were not exterritorial. *Id.* at 136–37.

14. See generally MOTI MORDEHAI MIRONI, *MEDIATION AND STRATEGIC CHANGE LESSONS FROM MEDIATING A NATIONWIDE DOCTORS' STRIKE* (2008) [hereinafter *MEDIATION AND STRATEGIC CHANGE*] (offering a full account of the doctors' mediation).

well-known businessman¹⁵ and a professional private mediator.¹⁶ This was unexpected. Unlike the United States, Canada, and certain other Western countries, Israel has no tradition of third-party involvement in labor disputes either in the form of mediation or arbitration. In the rare cases in which intervention had been used, the third parties were Histadrut leaders,¹⁷ politicians,¹⁸ and the Labor Courts.¹⁹

The Finance Minister and the government negotiators grudgingly assented to the Prime Minister's idea to use mediation. The IMA welcomed the Prime Minister's proposal, but rejected the government's request that the doctors discontinue the strike while mediation was in progress.²⁰ The IMA officials were concerned that the government had no intention of reaching a settlement; they feared that mediation was merely a device to bring the strike to an end just as the government was beginning to feel the political pressure. During the pre-mediation executive session, the government finally agreed that the status quo would be maintained for the period of time assigned for the mediation,²¹ that is, there would be neither discontinuance nor escalation of the strike.²²

With the strike entering its eleventh week, the mediation was expected to be short-lived—a classic crisis mediation. It turned out to be neither short nor crisis mediation. It was a long journey, which ended in a strategic agreement, one that not only settled the strike, but also had the potential to transform the landscape of labor-management and employment relations in Israel's public healthcare industry.

1. The Mediation Team

The mediation team was composed of two co-mediators, two assistant mediators, and a spokesperson.²³ The team members were selected for their ability to address specific roadblocks that might occur during the mediation process. For example, it was expected that the parties would have sharp disagreements regarding the database and methodology for analyzing the

15. The well-known businessman was Michael Federman, who is the President and CEO of Federmann Enterprises, Chairman of the Boards of Elbit Systems and Dan Hotels Corporation, and Chairman of the Board of Governors of the Hebrew University of Jerusalem.

16. The professional private mediator was Mordehai (Moti) Mironi, the author of this article.

17. See Ruth Ben Israel & Mordehai Mironi, *The Role of Neutrals in the Resolution of Interest Disputes in Israel*, 10 COMP. LAB. L.J. 356, 360 (1989) (noting that the current General Secretary of Histadrut has recently been involved in a third-party capacity in many labor disputes and strikes of non-Histadrut-affiliated unions).

18. The first attempt at third-party intervention in the doctors' strike was made by the Director of the Parliament Finance Commission. See ALON, *supra* note 10, at 82–83.

19. See Mordehai Mironi, *Labor Courts' Involvement in Labor Disputes in the Public Sector*, LAW & GOV'T (forthcoming).

20. In Israel, the government traditionally does not negotiate with workers who are striking.

21. The parties initially agreed to limit the mediation to two or three weeks.

22. See *supra* text accompanying note 11 (detailing the plans for escalating the strike).

23. The assistant mediators were Mr. Jonathan Kowarsky and Gershon Rodich. The former is an attorney and a full-time mediator and the latter is a mediator with a strong background in economics.

economic implications of possible proposals. Hence, one of the mediators was selected because of his proficiency in economics and data analysis. Moreover, because the strike was big news and mediation requires strict confidentiality, the parties accepted the mediators' request for a media blackout and hired a spokesperson. The spokesperson's duty was to issue joint statements, keep the media off the premises where negotiations were being conducted, and help monitor the parties' compliance with the media-blackout ground rules.

2. Special Challenges

From the outset, it was clear this was not a run of the mill interest labor mediation. This observation was reinforced as the mediation was progressing due to the accumulative effect of four interrelated issues: (1) the multidimensionality of the dispute, (2) the unbridgeable gap between the parties' positions, (3) the messy employment and labor relations in public healthcare, and (4) the poor history of negotiations.

a. The Multidimensional Character of the Dispute

The dispute was multi-issue, multi-party, and multi-layered. It was both inter- and intra-organizational; there was a high level of heterogeneity and diversity of interests on both sides as well as intricate relationships between players, both institutionally and personally. The high stakes involved were not limited to the IMA demands; they included the wide scope of the direct and indirect impact of potential outcomes (a "polycentric dispute").²⁴ That the mediation was conducted at the height of a long strike under threat of escalation further complicated matters by adding high levels of visibility, greater urgency and intensity, and the uninvited involvement of politicians, including the Prime Minister.

b. The Unbridgeable Gap Between the Parties' Positions

Highlights of the IMA's demands included increasing doctors' base salaries by 100 percent and overhauling the compensation structure in order to avoid the sharp decline in earnings during non-work periods, such as paid vacation, study leave, sick leave, and pensions. As an interim measure, the IMA asked to expand the salary base used for calculating these benefits by including on-duty and on-call payments.

The employers had demands too. They wanted to transfer state-employed doctors from a budgetary to a contributory pension fund and introduce some form of punch clock. As to the IMA's principal demand for a salary increase, the employers were unable to offer even a compromise figure. The government had committed to a strict wage policy. Negotiated wage increases were limited to the expected rate of inflation. For the doctors, this meant a long contract and a five-percent increase.

24. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978).

c. The Messy Employment and Labor Relations

The messy employment and labor relations of doctors in public healthcare were attributable to three strategic or systemic problems: (1) a convoluted compensation structure and the absence of a clear distinction between public healthcare and private practice in public hospitals and outside them; (2) the perceived lack of institutional flexibility in the public health system to embrace change (a classic example of the “tyranny of the status quo”);²⁵ and (3) that public healthcare appeared to be a complex interconnected web—a patchwork of policies, rules, procedures, practices, and local arrangements that had developed over the years. The Arbitration Award later termed this the “equilibrium of deformations.”²⁶ Due to the complexity, any meaningful change in one place in the system would likely cause difficulties up and down the line.

d. The Poor Negotiations History

Party leaders, who appeared to be skillful and experienced professionals, had been negotiating for over two years; the previous four-year agreement having expired two years before. During that time and despite intensive effort, they had been unable to reach agreement on a single issue.

Moreover, there were four unresolved issues that had been referred to continuous negotiations through a bipartite labor-management committee in 1994.²⁷ Although these were classic “integrative issues,”²⁸ six years later, they were still unresolved.

3. Mediation Contribution

The mediation process contributed uniquely to the negotiations in two ways. First and foremost, it transformed party discourse and relationships. Second, it led the parties to capitalize on their mutual frustrations²⁹ and construct by mutual consent innovative processes (that is, the “Public Commission” and the arbitration) aimed at overcoming the messy labor relations and the parties’

25. See MILTON FRIEDMAN, *TYRANNY OF THE STATUS QUO* 6 (1984).

26. Arbitration Award, *Israel Med. Ass’n v. State of Israel* 3 (Nov. 26, 2008) (unpublished manuscript) (on file with author).

27. The bipartite or parity committee consists of equal numbers of representatives (usually only one or two) from labor and management. They are neither neutral nor partisan. They are identified with the disputants but are at least one step removed (geographically or hierarchically) from the locus of the dispute. Being a dyad decision-making body, all decisions must be unanimous. The procedure operates as an informal, small-scale negotiation session between the parties’ appointees who maintain close contact with the disputants. In case of disagreement, the dispute is usually referred to a single arbitrator.

28. “Integrative issues” in the sense that the employers had the same interest as the doctors in resolving these long-standing problems. See RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* 144–59 (1965). One proof was the fact that, in the mediation, these four issues appeared on both sides’ list of demands.

29. The parties were deeply frustrated with their inability to effectuate changes that had been long overdue as well as with the two years of negotiations that had preceded the strike and the ten weeks of negotiations that preceded the mediation.

inability to negotiate to finality. These processes were intended to give doctors hope that the unbridgeable gap between the parties' positions would be addressed gradually as part of a systemic and strategic overhaul of the public health system.

Party representatives entered the mediation combatively with a high level of animosity, tension, mistrust, and pessimism, all resulting from two years of abortive negotiations and sewer labor relations. Following a relatively short period of mediation, the parties discovered its miraculous potential for transformation. The parties learned the virtues of interest-based dialogue and how to converse in a non-confrontational, polite, and productive way. After hundreds of hours of barren negotiations, the parties discovered that they were capable of agreeing, and, more importantly, speaking and actually listening to each other.

Evidence of the depth and strength of the transformation can be seen in (1) the relatively smooth adjustment of lawyers who joined the mediation at its tail end and had not undergone the transformative process during the first weeks; (2) the ease of forming and working through multi-party teams, such as the "Economic Table,"³⁰ the "Legal Table,"³¹ and the "Arbitration Team;"³² and (3) the parties' cooperation in launching a last minute "side-table"³³ mediation in order to resolve the issue of interns' working hours, which threatened to stall the signing of the agreement.

4. The Settlement

The settlement reached after more than two years of negotiations, 127 days on strike, and forty-two days of marathon-style mediation was revolutionary and innovative, and had potentially far-reaching implications for the medical profession. Furthermore, it was the first time in the history of Israel that a large and powerful union had given up its right to strike creating a sheltered, non-violent strike-free environment.

The settlement comprised three elements; the first was results-oriented, and the last two, dealing with strategic issues, were process-oriented. Each addressed a different timeframe. The first was short-term: the collective agreement. Its underlying goal was not only to improve doctors' income, but also to address the long-standing and pressing problems of doctors' pensions,

30. The "Economic Table" was a tripartite task force comprised of one representative from the Wage and Labor Agreements Division, the IMA's accountant, and one of the assistant mediators whose mission was to resolve issues of data collection and analysis of costs. *See* MEDIATION AND STRATEGIC CHANGE, *supra* note 14, at 52–54.

31. The "Legal Table" was a tripartite team composed of lawyers and non-lawyers charged with working out the details and drafting the collective agreement. *See id.* at 52–53.

32. The "Arbitration Team" was a tripartite team composed of lawyers responsible for developing and drafting the no-strike arbitration agreement. *See id.* at 54–62.

33. Referring to the last-minute mediation between a multi-party task force of second-tier representatives who negotiated with representatives of the Interns Association—a group that was recognized neither by the IMA nor by the employers, but was needed in order to effectuate the deal. *See id.* at 64–68.

the convoluted salary structure, and interns' working hours. In return, new doctors entering state employment would be transferred from a budgetary to a contributory pension plan. The second component was a public commission, which would be appointed by the Prime Minister to study the public healthcare system, examine the status of doctors from a systemic approach, and make recommendations for future action. The third and most daring component was the long-range agreement under which the IMA would give up its power to strike for the next ten years. In return, public health employers would give up their decision-making power regarding doctors' remuneration and working conditions. As a result, there would be no doctors' strikes and reason would replace force as the arbiter.

The settlement was welcomed by all with hope and optimism.³⁴ The parties believed they were about to embark on an experiment in a completely new style of labor relations. The public and policymakers hoped that if this pilot project succeeded, not only might it be extended to other essential services, but it could also change the culture of labor negotiations in Israel. Finally, that the parties were able to settle their dispute and find an integrative solution attested to the value of mediation.

III

THE NO-STRIKE ARBITRATION MODEL IN ACTION

The seeds of change planted during the mediation started to grow almost immediately. One of the mediators was asked to assist the parties' lawyers in concluding their negotiations over the design of the arbitration procedures. Given the euphoria and the cooperative relationships, the dialogue was smooth and productive. Shortly afterward, the Prime Minister began his search for candidates for the Public Commission, which was appointed five months after the agreement was signed. The future could not have looked better. Unfortunately, since then everything has gone downhill; all of the goodwill, the enthusiasm, the commitment, and the dreams have seemingly evaporated. This sad chapter is the theme of the following sections.

A. The Point of Departure

The solution³⁵ that ended the strike assured uninterrupted medical care for a period of ten years through final and binding arbitration as a quid pro quo for a blanket no-strike obligation. This meant arbitration not in lieu of court litigation, but in lieu of strife. In addition, the agreement attempted to deal with

34. As observed by Sever Plozker—a very prominent journalist. See ALON, *supra* note 10, at 193–94.

35. The term “solution” is used since the parties agreed to sign two collective agreements (one dealing with salary, fringe benefits, and working conditions, and one dealing with the no-strike arbitration). The government's obligations regarding the formation of the Public Commission and its mandate would be formalized by a letter signed by the Prime Minister.

two strategic issues that made it impossible to introduce any meaningful change in the organization of medical care and working conditions, even ones desired by all parties. First, the public healthcare system suffered from systemic problems and a convoluted system of human resource management for doctors. Second, the parties were facing difficulties in bargaining to conclusion.

In order to address the first issue, the government undertook to nominate a “Public Commission” chartered to investigate the public healthcare system and the status of doctors. The expectation was that the Public Commission’s recommendations would stir public-policy debate causing the parliament and the government to introduce systemic and structural changes that would cure the public healthcare system’s problems and improve doctors’ status and the quality of their working lives. In addition, it would produce a database, infrastructure, and recommendations for future changes in working conditions to be discussed and negotiated by the parties. Finally, although the Public Commission’s recommendations would be non-binding, they could be of assistance and guidance to the arbitration board.

The existence of a final and binding arbitration procedure, to be invoked unilaterally in case of failure to reach agreement, was supposed to address the second issue. The idea was that the threat of losing control over decision-making and the embedded uncertainty as to the outcomes would enhance direct negotiations between the parties (that is, the “deterrence effect”). Furthermore, in case the parties failed to agree on all or part of the issues, the arbitration board would bring finality.

B. The Public Commission

The government had undertaken to appoint the Public Commission within sixty days. In fact, it took five months. In December 2000,³⁶ the Prime Minister appointed the seven-member Public Commission, chaired by a former parliament member and Assistant Finance Minister, to investigate the public healthcare system and the status of doctors. The Public Commission was given a broad mandate and was asked to deliver its findings and non-binding recommendations within a period of six to twelve months. The public employers and the IMA submitted voluminous studies and working papers to the Commission. The Commission itself solicited position papers from different stakeholders, conducted fifty hearings, and met with experts.

In January 2003, the Public Commission issued its 264-page final report recommending, *inter alia*, the parties sign a collective agreement aimed at reforming the employment relations and remuneration system in public healthcare within eighteen months.³⁷ Soon thereafter, the IMA discovered that, although the Health Ministry had fully embraced the Public Commission’s

36. Arbitration Award, *supra* note 26, at 8.

37. *Id.* at 6.

report and recommendations,³⁸ the government had no intention of considering the report, let alone implementing its recommendations.³⁹ Several attempts by the IMA⁴⁰ to change the government's attitude towards the report failed. A statement made by the State's Attorney to the High Court of Justice⁴¹ said bluntly that the state had fulfilled its obligation towards the IMA by creating the Public Commission.

The IMA petitioned⁴² the High Court of Justice to order the government to consider the report. The court gave a consent judgment ordering the government to create a task force representing the Finance and Health Ministries, the State Service Commissioner, the Attorney General, and the Prime Minister's Office. The task force would consult with the IMA and would later bring the report before the government or the Social and Economic Cabinet. The task force never invited the IMA to its deliberations nor honored the IMA's request to receive the records of the meetings.

The fact that no attention was paid to the Public Commission's recommendations was not the only setback for the IMA. Far more problematic was that, for reasons beyond the IMA's control, waiting for the report caused a long, and in retrospect, unfortunate delay in launching the first round of negotiations and arbitration under the new model.

C. The Long Way to Arbitration

According to the collective agreement that ended the strike, negotiations were scheduled to resume in July 2001 and the arbitration could be invoked six months later. The IMA did not initiate the negotiations in time for two reasons. First, a series of terrifying terrorist attacks and data indicating a severe economic slowdown immediately after the 2001 election caused the government to adopt a strict wage freeze for fiscal years 2001 through 2003.⁴³ Second, the IMA was waiting for the Public Commission's report in order to substantiate its demand for the coming negotiations and arbitration. When the report was finally completed, the IMA discovered it was too late.

Instead of being the "moving and demanding" side, the IMA found itself running a defensive battle, trying to block the government's initiative to temporarily cut doctors' salaries by twelve to seventeen percent. These intended wage cuts were part of the austerity measures aimed at economic recovery by encouraging growth. The plan (named "The Economic Plan") had

38. See IMA's Position Paper at 5-6, Submitted to the Social and Economic Cabinet (Sept. 2008).

39. Arbitration Award, *supra* note 26, at 10.

40. One request was made to the Division Director of Wage and Collective Agreements at the Finance Ministry. His response was that the Prime Minister had first to decide whether to accept all or part of the recommendations along with the timetable for implementation. See ALON, *supra* note 10, at 234.

41. *Id.* at 236.

42. HCJ 3932/03 Israel Med. Ass'n v. State of Israel [2005] (unpublished) (Isr.).

43. The Treasury Minister and the Director of Wage and Collective Agreements declared that the wage freeze was just a first step in the more severe austerity measures.

been agreed upon through concession bargaining with the Histadrut. Although the IMA is not part of the Histadrut,⁴⁴ the Government-initiated legislation extended the agreed-upon measures to all public-sector employees.⁴⁵

The IMA requested that the Prime Minister, the Finance and Health Ministers, the State Service Commissioner, and the Attorney General discuss the government's "Economic Plan" at the bargaining table and in arbitration under the no-strike arbitration agreement. The IMA's plea was rejected on the ground that the "Economic Plan" was extrajurisdictional to the no-strike arbitration agreement.⁴⁶ The IMA attempted to block the intended legislation through the High Court of Justice⁴⁷ alleging that such legislation would constitute a breach of contract. Chief Justice Barak was sympathetic to the IMA's position. Nevertheless, the court convinced the IMA to withdraw its petition. Soon thereafter, the legislation was passed.⁴⁸

Disenchanted with the government's refusal to consider the Public Commission's report and its abortive attempt to block the legislation, the IMA petitioned the National Labor Court to compel the public employers to submit all outstanding issues to arbitration.⁴⁹

D. The Court Ushers the Parties into Arbitration

While it was clear the IMA had wanted arbitration all along, the public employers had to be forced into it by the court. This asymmetric attitude was evident from the state's arguments to which all other public employers readily joined. In complete disregard of the language and the underlying intention of the no-strike arbitration agreement, the state submitted a three-pronged argument to the court.⁵⁰ First, wage policy is the domain of the government, not of an arbitrator. Second, only the parties have the authority to decide on the total cost of the agreement (that is, the arbitrator can only decide on its allocation among parties' demands). Third, in signing the no-strike arbitration agreement, the parties had intended that only a limited number of issues would be brought before the arbitrator, leaving the majority of issues to be agreed upon by the parties. It is noteworthy the state clung to these arguments, knowing that the parties had been through fruitless negotiations for twelve months.

44. *See supra* note 5.

45. In addition to cutting doctors' income, the bill contained several rationing measures and organizational changes that had a direct impact on doctors' working environments. In particular, the bill led to further deterioration in areas such as doctors' pensions and malpractice insurance.

46. ALON, *supra* note 10, at 237.

47. HCJ 3932/03 Israel Med. Ass'n v. State of Israel [2005] (unpublished) (Isr.).

48. The Israel Economy Recovery Law (Legislation Changes Aimed at Achieving Targeted Budget and Economic Policy for Fiscal Years 2002–2003) 2003.

49. LC 9/03 Israel Med. Ass'n v. State of Israel 40 PDA 821 [2005] (Isr.).

50. Interim Decision, May 30, 2005, LC 9/03 Israel Med. Ass'n v. State of Israel 40 PDA 821 [2005] (Isr.).

The National Labor Court rejected the state's arguments. It appraised the no-strike agreement as a breakthrough in labor relations, which translated into practice the desirable public policy of settling labor disputes peacefully without a strike.⁵¹ The court was determined to make the no-strike arbitration work.

The National Labor Court conducted several hearings and issued three decisions that paved the way for the arbitration:

1. The first decision was in fact a consent judgment. The court assisted the parties in agreeing on a stay for a limited period during which they would negotiate under the supervision of the court.⁵²
2. The second⁵³ was rendered fourteen months later and contained four operative messages. First, the court declared the parties had exhausted the negotiations phase and the dispute was ripe for arbitration.⁵⁴ Second, the court drew up a list of subjects that fell under the arbitration's jurisdiction. The court cautioned itself that it must interpret the agreement prudently since, for all those involved, this was an innovative and experimental endeavor.⁵⁵ Third, the court allowed the parties a short period to select an arbitrator or an arbitration board by mutual consent and provided a procedure by which it would appoint if parties failed to select on their own. Fourth, the court ordered the arbitration to commence within one month. Finally, because no agreement had been reached through the prolonged and direct negotiations, the court advised the parties to consider using mediation.⁵⁶
3. The third decision⁵⁷ completed the role of the court as a producer of the arbitration. The court appointed the three neutral arbitrators and decided their fees, as well as the initial allocation of cost between the parties. Finally, the court empowered the arbitrators to interpret its previous decision about what was subject to arbitration using their own discretion.⁵⁸

In addition to the practical aspects, the three decisions reflected the court's determination to make the no-strike arbitration model work. Fearing that the controversy over arbitrators' fees would prolong the arbitration,⁵⁹ the court interpreted its authority to appoint an arbitrator to include matters of fees. The court went far in criticizing the state's attitude towards the arbitration. It

51. *Id.* at 6.

52. Interim Decision, Mar. 31, 2004, Israel Med. Ass'n v. State of Israel [2005] (unpublished) (Isr.).

53. Interim Decision, May 30, 2005, Israel Med. Ass'n v. State of Israel 40 PDA 821 [2005] (Isr.).

54. *Id.* at 7.

55. *Id.*

56. *Id.* at 11.

57. Interim Decision, Aug. 25, 2005, Israel Med. Ass'n v. State of Israel 40 PDA 821 [2005] (Isr.).

58. *Id.* at 3.

59. *Id.* at 2.

emphasized the arbitration was not in a dispute between two individual entities involved in a discrete transaction but rather within a context of a collective dispute and continuing relationship. Hence, the state had the duty to act in good faith to enable the arbitration to proceed. The results of these three decisions set the stage, the cast, and the tone for the arbitration.

IV

THE ARBITRATION BOARD

The economic crisis of 2001 and the “Economic Plan” of 2003⁶⁰ were not the only exogenous factors that caused serious delay in the arbitration. Another important factor was a series of independent and unexpected events that led to an unusually high turnover of arbitrators on the arbitration board.

The no-strike arbitration agreement provided two options for the structure and composition of the arbitration board:⁶¹ (1) a classical tripartite board with one neutral arbitrator and two partisan arbitrators, and (2) a neutral-skewed tripartite board composed of three neutral members and two partisan arbitrators. The parties chose the latter. This may partially explain the magnitude of problems encountered by the arbitration board.

A. The High Turnover of Arbitration Board Members

The makeup of the arbitration board and the emerging dynamics among its members are the most important factors in any major arbitration. This is especially true in a high-stakes, complex, and polycentric⁶² arbitration conducted by a five-member tripartite board. Thus, from a process perspective, a turnover of 100 percent in board membership was a serious cause of delay and a major obstacle to board functionality.

According to the agreement, the parties were charged with the selection of the neutral arbitrators. The parties asked the National Labor Court twice⁶³ to assist in the selection process and finally the court appointed the three neutral arbitrators.⁶⁴ The identities of the two partisan arbitrators—the IMA’s Chairman and the Director of the Wage and Collective Agreements Division at the Finance Ministry—were already dictated in the no-strike agreement.

60. See *supra* note 45 and accompanying text.

61. See generally *An Innovative Model for Contract Renewal Negotiations and Arbitration—The Mediators’ Proposal*, in GENERAL COLLECTIVE AGREEMENT BETWEEN ISRAEL MEDICAL ASSOCIATION AND STATE OF ISRAEL 20000587, GENERAL HEALTH SERVICES, AND HADASSAH (June 13, 2005), available at <http://www.tamas.gov.il>.

62. See Fuller, *supra* note 24, at 394. See also LC 9/03, *supra* note 49.

63. See Interim Decision, May 30, 2005, LC 9/03 Israel Med. Ass’n v. State of Israel 40 PDA 821 [2005] (Isr.); Interim Decision, Aug. 7, 2005, LC 9/03 Israel Med. Ass’n v. State of Israel 40 PDA 821 [2005] (Isr.).

64. Interim Decision, Aug. 7, 2005, LC 9/03 Israel Med. Ass’n v. State of Israel 40 PDA 821 [2005] (Isr.).

In addition, during the four-year period, there were five changes in the composition of the arbitration board. Only two arbitrators, one neutral arbitrator and one partisan arbitrator, served the full term. Two neutral arbitrators, one of them the first chairman, resigned. The partisan arbitrator representing the state and other public employers—the Director of the Wage and Collective Agreements Division—had to be replaced three times; twice because those who held this office left and once because the newly appointed Director passed away suddenly after a very short time in office.

B. The Confusion and Misconception as to the Partisan Arbitrators' Role

The tripartite structure is a new paradigm in Israel's labor relations and arbitration scene. The only known decision-making bodies that are neither purely neutral nor mutually selected are the bipartite committees⁶⁵ and the dyad arbitration board, that is, a two-member arbitration board composed of parties' appointees.⁶⁶ Fear of the unknown⁶⁷ was probably the reason the parties chose a hybrid model—a neutral-skewed tripartite board. In retrospect, this choice intensified the confusion regarding the partisan arbitrators' role. The differentiating line between a party's appointee in a three-member arbitration board or in a dyad arbitration board, on the one hand, and a partisan arbitrator in a tripartite structure, on the other hand, was unclear. This misunderstanding was shared by all—the arbitrators, the court, and the parties. It came up in the records of the arbitration proceedings and the Arbitration Award, as well as in court decisions and interviews.

At a relatively early stage,⁶⁸ the arbitration board decided to hold two types of meetings: one for the neutral arbitrators only, and another less-frequent meeting for the whole arbitration board. Another practice of segregation involved disallowing the partisan arbitrators' free access to economic analyses and legal opinions prepared by the arbitration board's consultants upon request

65. See *supra* note 27. This arbitration model can also be found in Islamic family law for cases of divorce. See Ottoman's Family's Rights Law 1917 § 130; H CJ 11230/05 Hanan Ibraheem Muasi v. The Sheria Appeal Ct. in Jerusalem (unpublished) (Isr.) (available in Nevo on Mar. 7, 2007).

66. This model of arbitration (in Hebrew "Zabla") is commonly used for civil and labor disputes. Similar to the bipartite committee, there is an even number of decision-makers, almost always two, and each is selected by one disputant. The difference is that under this arbitration model, the arbitrators are expected to be quasi-neutral. They conduct a full arbitration hearing and issue a final and binding arbitration award. If they fail to reach a unanimous decision, the disputants or the two arbitrators choose a neutral arbitrator. The newly elected neutral arbitrator may act as a single arbitrator or join the partisan arbitrators as chairman of a three members arbitration board holding a controlling vote. See 1 SMADAR OTTOLENGHI, *ARBITRATION: LAW AND PROCEDURE* 367–70 (4th ed. 2005).

67. It should be emphasized that the difficulty was not the triadic structure. A three-member arbitration board with two parties' appointees as quasi-neutral arbitrators and a neutral arbitrator is common. The "unknown" refers to the partisan arbitrators who are neither quasi-neutral nor one step removed like the members of the bipartite committee. They are the disputants' leaders.

68. Arbitration Interim Decision, May 4, 2007, Israel Med. Ass'n v. State of Israel [2007] (unpublished) (Isr.) (confirmed by Arbitration Decision, Oct. 6, 2008, Israel Med. Ass'n v. State of Israel [2008] (unpublished) (Isr.)).

of the neutral arbitrators.⁶⁹ As justification, the arbitration board relied on a court decision denying the public employers' request to order the arbitration board to share with the parties any legal opinions and economic working papers being used.⁷⁰ This reasoning ignores the fact that partisan arbitrators are by definition full-fledged arbitrators with equal power in a five-member arbitration board.

In a later decision,⁷¹ the arbitration board attempted to define the partisan arbitrators' role. The decision emphasizes that, as a general rule, a party's appointed arbitrator is akin to a director in a corporation. Once in office, he must distance himself from the party who appointed him. The decision admitted that this arbitration was an exception. The partisan arbitrators were not independent. Furthermore, they were in positions that made it only legitimate to be in touch with those who had appointed them. Nonetheless, toward the end of the arbitration, when the arbitration board would deliberate and make the final decision, the partisan arbitrators would be expected to distance themselves from the parties.

This statement is not clear since many decisions taken throughout the arbitration proceedings may impact the final outcome and be as important as the final decision. Furthermore, the arbitration board was cognizant of the importance of its interim decisions when it emphasized that the forum of the neutral arbitrators would be devoted to exchanging ideas and that the decision would be made only by the full arbitration board.⁷²

The state and public employers did not buy into the court's seemingly appeasing statement. They were afraid the neutral arbitrators intended to distance themselves from the partisan arbitrators, segregating them and taking away their right to fully participate in the decision-making. In retrospect, the state and public employers' fears were well grounded. They were also the only ones to correctly understand the essence of the tripartite structure.

The state and Clalit petitioned the National Labor Court towards the end of the arbitration⁷³ to stop all meetings of the neutral arbitrators' forum and order all working meetings be conducted with the full arbitration board. The court denied the petition on two grounds.⁷⁴ First, the limitation placed upon the neutral arbitrators not to make decisions without the partisan arbitrators was a sufficient safeguard. Second, the partisan arbitrators had expressed no complaints.

69. Arbitration Award, *supra* note 26, at 24.

70. *Id.*

71. Arbitration Interim Decision, Mar. 26, 2008, Israel Med. Ass'n v. State of Israel [2008] (unpublished) (Isr.).

72. Arbitration Interim Decision, June 10, 2008, Israel Med. Ass'n v. State of Israel [2008] (unpublished) (Isr.).

73. LC 12/08 State of Israel v. Israel Med. Ass'n [2008] (unpublished) (Isr.).

74. *Id.* at 18–19.

The misunderstanding as to the partisan arbitrators' role peaked during the last days, just before the Arbitration Award was signed and released. In contrast to their prior obligation, the neutral arbitrators did not invite the partisan arbitrators to the deliberations. The partisan arbitrators were neither involved in the final decision-making process nor in drafting the Arbitration Award. Furthermore, the neutral arbitrators refused to show the draft to the partisan arbitrators. The state and other public employers approached the court again with an urgent petition for an injunction to prevent the release of the Arbitration Award before their partisan arbitrator read it and expressed his position.⁷⁵

The court ignored the fact that the neutral arbitrators had acted in violation of their prior obligation as sanctioned by the court.⁷⁶ It also disregarded the fact that the partisan arbitrators were actually the leaders of the parties and not quasi-neutral arbitrators. The court ordered the arbitration board's chairman to give the draft of the Arbitration Award to the partisan arbitrators but directed these arbitrators not to divulge any information discussed during the deliberation to anyone.⁷⁷

The court's order would enable the partisan arbitrators to fulfill just one important function of the tripartite board in contract-renewal arbitration: improving the practicality and workability of the award by avoiding unintentional mistakes stemming from the neutral arbitrators' unfamiliarity with the complexities and intricacies of labor relations and working conditions. One obstacle, however, still remained—the strict confidentiality.

The confidentiality requirement created difficulties for the partisan arbitrator representing the state and other public employers on two levels. First, the partisan arbitrator was new in office as a Director of Wage and Collective Agreements and still learning his way. The sweeping confidentiality rules ignored a prior court decision⁷⁸ that would have allowed him to be accompanied by his assistant into the arbitrators' deliberations. Second, this partisan arbitrator represented two large and very distinctive employers—the state and Clalit. Not only does the former operate only hospitals and the latter hospitals and HMO clinics, Clalit's doctors' working conditions are sometimes different from the state's. Naturally, this partisan arbitrator needed to consult with both. The public employers approached the court again⁷⁹ asking to relieve their partisan arbitrator from his confidentiality obligation in order to address these two shortcomings.

The court issued a consent judgment. Nonetheless, it refused the petition that would have enabled the arbitrator to consult and solicit data from Clalit for

75. LC 19/08 State of Israel v. Israel Med. Ass'n [2008] (unpublished) (Isr.).

76. They were not supposed to make the decision on their own. *See* LC 12/08, *supra* note 73, at 19.

77. LC 19/08, *supra* note 75, at 1–2.

78. LC 483/08 Israel Med. Ass'n v. State of Israel [2008] (unpublished) (Isr.).

79. Interim Decision, Nov. 23, 2008, LC 19/08 Israel Med. Ass'n v. State of Israel [2008] (unpublished) (Isr.).

the final deliberations.⁸⁰ In addition to its insensitivity and misconception of the tripartite structure, the court's reasoning is legally wrong. First, it wrongly equates a partisan arbitrator in a tripartite arbitration board with a party-appointed arbitrator in a dyadic arbitration board. Consequently, the court believes once partisan arbitrators are appointed, they must sever the relationship with the parties they represent.⁸¹ Not only does adhering to this norm prevent partisan arbitrators from performing their functions in a tripartite structure, but it is also unfeasible given that the partisan arbitrators are the parties' leaders.

Second, the court assumes that the Arbitration Law is *jus cogens*, that is, a set of norms not subject to change through parties' consent, and thus may not tolerate any other reading of the tripartite structure. In fact, there is no authority supporting the assertion that the Arbitration Law is indeed *jus cogens* and it is difficult to see why the tripartite structure does not fit Arbitration Law principles.

In any case, the fact that the court finally enabled the partisan arbitrators to read the Arbitration Award before its release and to provide their input enabled the avoidance of unintentional mistakes. At the last moment, the basis for calculating the salary increase in the Arbitration Award was modified to permit continuation of the existing relationship between the income of doctors working in hospitals and their counterparts working in Clalit clinics.

V

THE ARBITRATION PROCESS

The first session of the arbitration took place on December 20, 2005, four years after the first arbitration was supposed to begin and almost a year after the three neutral arbitrators had been appointed. The Arbitration Award was rendered almost three years later on November 26, 2008, and it covers the period until the end of the no-strike agreement. The IMA brought eleven issues for arbitration and the state and other public employers brought ten issues. The arbitrators conducted over twenty arbitration sessions and heard thirty witnesses.⁸² Thirteen of the sessions were plenary⁸³ with fifty attendees, including the full five-member arbitration board and large party delegations accompanied by their legal counsels. The sessions were recorded and transcribed.

The arbitration was very expensive. In addition to the arbitrators' fees and expenses, the costs included outside consultants and lawyers who provided services to the board. Despite being purely non-legal interest arbitration, the sessions were completely dominated by the parties' legal counsels. According to

80. *Id.* at 5.

81. *Id.*

82. Interim Decision, June 24, 2008, LC 12/08 Israel Med. Ass'n v. State of Israel [2008] (unpublished) (Isr.).

83. Arbitration Award, *supra* note 26, at 5.

the interviews, the latter, especially those who represented the public employers, could not tolerate the *sans frontiers* arbitration and had not internalized that the arbitration was a substitute for negotiations, dialogue, and strike. They insisted on more formal, adversarial, and litigation-like arbitration. Not only were they more familiar with the model, but this was also the only way they could envisage maintaining some control to constrain the arbitrators and to reduce the level of uncertainty. The IMA leadership had a different reading. They perceived the public employers' legal counsels' attitude and legal position as a tactic to prolong the arbitration, to intimidate and put pressure on the arbitrators, and to prepare ammunition for an *ex post* petition to quash the Arbitration Award.

The interviews reveal this adversarial approach was incongruent with the board members' background and their role perception. The three neutral arbitrators who conducted the vast majority of the arbitration sessions were not legal practitioners or former judges. Their fame and experience came from business, management, accounting, and high-level political offices. They accepted the appointment in order to help the parties solve an economic dispute promptly and efficiently. They also perceived their role as a public mission and an opportunity to introduce some reforms in public healthcare, which they labeled "equilibrium of deformations."⁸⁴ The three neutral arbitrators wanted to conduct open and informal arbitration.⁸⁵ They preferred listening to people (not to testimony), canvassing and taking in as much information as possible, and being free to meet privately outside formal hearings with stakeholders and experts.⁸⁶ They had no tolerance for legal niceties and refused to be put in the procrustean bed of court-like arbitration.

The clash between these two approaches was evident; tension and distrust between the arbitrators and the state and Clalit's counsels heightened with time. It did not stop at the arbitration's hall door. A leading newspaper published a letter written by the state's counsel to the arbitrators and cited an unnamed source at the Finance Ministry⁸⁷ blaming the arbitrators for being one-sided. Allegedly, the arbitrators were exposed to documents and data provided by the IMA either directly or through Ernst & Young—a consulting firm engaged by the arbitrators—without notifying the public employers or letting them see the materials and respond. The letter accused the arbitrators of improprieties in conducting the arbitration proceedings that bordered on criminal behavior.

84. Arbitration Award, *supra* note 26, at 3.

85. See Arbitration Hearing, Mar. 26, 2008, Israel Med. Ass'n v. State of Israel at 6 [2008] (unpublished) (Isr.).

86. For instance, they met privately with hospitals' general managers in order to hear firsthand their view as to the problems with the doctors' remuneration system. On March 26, 2008, the arbitration board decided that it would cease this practice. See Arbitration Hearing, Mar. 26, 2008, Israel Med. Ass'n v. State of Israel at 2 [2008] (unpublished) (Isr.).

87. Roni Linder-Ganz, *The Finance Ministry Attacks the Arbitrators in the Dispute over Doctors' Salary: You Have Hidden Information from Us*, MARKER, Oct. 3, 2008, at 2.

The IMA saw this as an attempt to put pressure on the arbitrators;⁸⁸ others believed it seeded the ground for quashing the award.⁸⁹ In any case, these allegations, especially the last, caused all hell to break loose. It created acrimony between the three neutral arbitrators and the public employers' counsels, which resulted in bitter exchanges during the arbitration sessions. The attack on the neutral arbitrators' conduct brought the chair to adopt two measures. First, he ordered the arbitration board's secretary to list and, when necessary, to make copies of all the documents in the arbitration files.⁹⁰ Second, he hired the head of the leading labor and employment law firm in Israel as the arbitration board's legal counsel.

VI

THE ARBITRATION AWARD

The ninety-eight-page Arbitration Award contains, in fact, three separate awards—one written by the three neutral arbitrators and the other two written by each of the partisan arbitrators. These are not dissent opinions, as are commonly seen in arbitration, but full-text arbitration awards. They are standing testimony to the neutral arbitrators' failure to fully engage the partisan arbitrators on the board.

The substantive and operative part of the award is relatively short and simple. It covers the period through the end of the ten-year no-strike arbitration agreement. It provides for an across-the-board wage increase of 23.5 percent and for an additional sum equivalent of 0.7 percent to be paid to doctors employed in fields suffering from an acute shortage, that is, intensive care, neonatology, and anesthesiology. The total figure, 24.2 percent, was adopted from a settlement that had been reached in the recent dispute between the Senior Academic Staff Unions at the seven public universities and the government after a long strike. The Arbitration Award concludes that it is only reasonable to grant the doctors who chose not to strike the same wage increase that had been granted by the government⁹¹ to those who did.⁹² The award then goes on to anchor this to the decision-making criteria⁹³ stipulated in the no-strike arbitration agreement.

88. *Id.* The neutral arbitrators shared this impression. *See* Arbitration Award, *supra* note 26, at 25.

89. Roni Linder-Ganz, *The Finance Ministry Is Preparing for Loss*, MARKER, Oct. 3, 2008, at 2.

90. Arbitration Award, *supra* note 26, at 24.

91. The award explains that if such a wage increase was granted by the government holding full power and discretion, it can be granted in situations when the power and discretion have been taken from the government and handed to the arbitrators. Arbitration Award, *supra* note 26, at 40.

92. *Id.* at 33, 36.

93. *Id.* at 27–30. The criteria are salary and working conditions in similar occupations, the labor market for doctors, special working conditions (such as pressure, responsibility, education, and physical-hygiene factors), the government wage policy, stability of labor relations, and cost of living. *See supra* note 61, at Appendix.

The most meaningful aspect of the Arbitration Award is the non-operative and non-binding part. The award describes at length the no-strike arbitration agreement, the underlying intent and assumptions of its architects, and the milestones in the arbitration. Finally, it provides, as obiter dictum, a set of non-binding albeit detailed recommendations regarding a host of substantive issues dealt with during the arbitration.

The approach adopted by the Arbitration Award was unexpected and incomprehensible. During the proceedings, the arbitration board had dealt with many subjects and canvassed in-depth information and insights about public healthcare and related issues using a wide-angle lens. It heroically rebuffed attempts by the state and public employers to limit subjects for arbitration in advance. But when it came to the finishing line, the neutral arbitrators chose the opposite approach and took it to the extreme. The award excludes a host of subjects from the substantive part, subjects that were undoubtedly under the board's jurisdiction, and confined itself to two straightforward bread and butter issues. One probable explanation is the neutral arbitrators wished to express their deep frustration with the state of public healthcare, the parties' negotiation culture, and the untenable position that the state and other public employers had put them in. The following is a brief account of the way this frustration is dealt with in the award.

A. Public Health as Equilibrium of Deformations

Throughout the award, the arbitrators vociferate that the public health system has been operating for years as an "equilibrium of deformations"⁹⁴ that is in an acute situation and urgently needs systemic change. The arbitrators blame public employers for being inattentive to immediate needs for reforms in order to cope with new challenges such as the threatening growth of non-egalitarian private medical care, emigration of doctors, and the future shortage of doctors.⁹⁵ They also criticize the government for its failure to overhaul the system following the Public Commission's report and recommendations.⁹⁶ The neutral arbitrators emphasized that they had undertaken to become arbitrators as a public mission in which they saw themselves, to some extent, following in the footsteps of the Public Commission.⁹⁷ Their goal was to promote employment-related reforms in the management of doctors' work, remuneration, and working conditions. Notwithstanding, the basic premise underlying the award is that real reforms can come only through negotiations and the arbitration board is devoid of ability, power, or authority to do so.

94. Arbitration Award, *supra* note 26, at 3.

95. *Id.* at 10.

96. *Id.* at 18.

97. *Id.* at 10.

B. The Negotiations Culture—Getting to “No”⁹⁸

The arbitrators criticize the parties for their ongoing failure to negotiate on their own and their inability to agree on a single issue appearing on their common and separate agendas. According to the award,⁹⁹ failure to address these issues has led to the demise of the public health system due to its inability to adjust to the changing environment as well as patients and doctors' needs. The criticism refers to the opportunities for negotiating directly before and throughout the arbitration as well as to negotiating through the partisan arbitrators within the safe harbor¹⁰⁰ provided for by the tripartite structure of the arbitration board. The arbitrators complain that whenever they urged the parties to negotiate, their efforts were misconstrued. Instead of seeing it as an opportunity to bring about a real and sustainable change through autonomous negotiations, the parties perceived the arbitrators' initiative as relinquishing the power of decision-making and returning it to the public employers.¹⁰¹

C. The Chained Arbitrators

The neutral arbitrators were frustrated with the parties, especially the state and other public employers, for constantly trying to tie the board's hands and prevent it from deciding on reforms that both sides perceived as badly needed and long overdue.¹⁰²

As an example, the award raises the subject of private medical care provided after the doctors' working day under public-hospital auspices.¹⁰³ This could benefit the mutual interests of both public employers and doctors, and has been on the agenda and in stalemate for years. Nonetheless, the arbitrators were not allowed to address it in their decision. The award noted that all hospital general managers who had testified in the arbitration had urged the board to include as many reforms as possible in the award. In contrast, those who represented the public employers insisted that doing so would result in a loss of credibility and trust for the arbitrators and for the award.¹⁰⁴

The neutral arbitrators' point of departure was that they were not allowed to decide on reforms or change work practices without specific authorization through full consent of the parties.¹⁰⁵ To their disappointment, the public employers were acting against their own interests. Instead of using the arbitration as a platform to introduce reforms, they insisted throughout the

98. See generally ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 1981) (this section paraphrases the title of this book).

99. Arbitration Award, *supra* note 26, at 4.

100. The award uses the term “sheltered home.” *Id.* at 4, 49.

101. *Id.* at 4.

102. *Id.* at 62–63.

103. *Id.* at 4.

104. *Id.* at 36.

105. Arbitration Award, *supra* note 26, at 25.

arbitration on a very narrow reading of the board's authority. In the concluding sentence, the neutral arbitrators summarize their frustration by saying that they had come to office to introduce a lasting change in the system of public healthcare. Unfortunately, they found their hands tied.¹⁰⁶

VII EVALUATION

This part draws heavily on the interviews with the parties and their counsels. The experience under the no-strike arbitration agreement is evaluated using the following six criteria: (1) industrial peace; (2) impact on negotiations; (3) impact on employment and labor relations; (4) cost and time; (5) court intervention; and (6) acceptability and satisfaction. These criteria are commonly used in the literature.¹⁰⁷ The analysis of the findings will be discussed in the next part.

A. Industrial Peace

Like elsewhere,¹⁰⁸ the no-strike arbitration agreement's major success was in avoiding strikes. Although during this period there were 280 incidences of strike and job actions (that is, sanctions) in the public sector and twenty incidences in the field of public health and welfare, there were no reported strikes or other job actions by doctors.¹⁰⁹

According to the new IMA chairman, the sweeping ban on strikes was badly exploited by line managers, primarily senior management and hospitals' general managers, who knew that the IMA was restrained by the no-strike agreement. They unilaterally introduced changes in work practices, working conditions, and doctors' working environments. Note that the no-strike arbitration agreement provided that any strike by the IMA would end the agreement to submit unsettled issues to arbitration. Any alleged violation of the no-strike obligation would suspend arbitration proceedings, and findings of breach would render the agreement null and void.

106. *Id.* at 65.

107. THOMAS A. KOCHAN, MORDEHAI MIRONI, RONALD G. EHRENBERG, JEAN BADERSCHNEIDER & TODD JICK, DISPUTE RESOLUTION UNDER FACT-FINDING AND ARBITRATION: AN EMPIRICAL EVALUATION 4-9 (1979) [hereinafter KOCHAN MIRONI]; Thomas A. Kochan, David B. Lipsky, Mary Newhart & Alan Benson, *The Long-Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, 63 INDUS. & LAB. REL. REV. 565, 569 (2010) [hereinafter Kochan Lipsky].

108. Kochan Lipsky, *supra* note 107, at 569-70.

109. See generally MINISTRY OF COMMERCE, INDUSTRY & EMPLOYMENT, THE LABOR RELATIONS COMMISSIONER'S REPORT ON STRIKES, available at <http://www.moital.gov.il/NR/exeres/59E50665-0620-47B8-9C1F-DBA9248B4972.htm>. Some of the strikes, like those of the high school teachers and the senior academic staff, were very long.

B. Compatibility with Negotiations

The no-strike arbitration model was premised on the following assumptions: (1) during the ten years, there would be several rounds of negotiations; (2) in order to avoid the uncertainty and loss of control over the outcomes associated with arbitration, the parties would reach agreement on their own; (3) even if they failed to reach agreement, the issues left for arbitration would be marginal and well defined; and (4) if parties resorted frequently to arbitration, they would learn and adapt as a result of the experience, which would “even out” the outcomes.

In reality, none of these assumptions materialized. Due to the economic crisis, the high turnover of arbitrators, the ongoing litigation over the scope of the arbitration, and the length of the arbitration proceedings, there was only one round of negotiations and a single arbitration experience. Furthermore, the availability of arbitration as a post-negotiations step created a “chilling effect.”¹¹⁰ Instead of negotiating, the parties were rushing to arbitration; and instead of conceding and moving during the negotiations, the parties adopted extreme positions¹¹¹ and stuck to them in preparation for the arbitration. Finally, instead of “leftovers” from the negotiations (that is, marginal and well-defined issues), the parties brought all of the issues in dispute to arbitration.¹¹²

C. Impact on Employment and Labor Relations

Experience with interest arbitration¹¹³ indicates it is a conservative process. Arbitration boards tend to rely on comparability and stay away from reforms and innovations. This case is no exception. It is only exceptional in the degree of conservatism and the disproportion between the breadth and depth of the arbitration proceedings and the substantive outcome.

After very lengthy and costly proceedings that analyzed a broad array of work-related issues, the arbitration board confined itself to a relatively simple and narrow solution. The award provides for an across-the-board wage increase and additional small increases to doctors practicing in fields with acute shortages, which may improve their ability to attract doctors. Otherwise, the substantive part of the award carries far less impact on employment relations than the agreement signed at the end of the mediation.¹¹⁴ The eighteen months since the release of the award indicate that the fears of the public employers regarding the threatened stability of labor relations with other unions in the

110. See Kochan Lipsky, *supra* note 107, at 566.

111. Arbitration Award, *supra* note 26, at 4.

112. *Id.*

113. Kochan Lipsky, *supra* note 107, at 583; Mordehai Mironi, *Arbitration as Strike Substitute in Labour Negotiations—Public Policy Reconsidered*, 28 ALTA. L. REV. 163, 190–91 (1980).

114. The agreement of 2000 attempted to address the skewed salary structure through pay differentials and introduce changes in pension rights in order to address the different needs of public employers and doctors. In addition, it tried to solve the old problem of interns working after on-duty shifts.

public sector and in public health (that is, the “domino effect”¹¹⁵) did not materialize.

The arbitration proceedings left all the participants with bad bruises. More important, one of the no-strike arbitration agreement’s goals was to create a new and improved labor-relations regime built on cooperation, mutual trust, and understanding.¹¹⁶ In fact, as the interviews clearly demonstrate, the long road to arbitration and the highly combative litigation and arbitration proceedings intensified the rivalry, animosity, and distrust between the parties. The Arbitration Award left the relationship between the IMA and the public employers in deep crisis.¹¹⁷

However, the Arbitration Award may have a broad and sustainable impact in the long run. A substantial part of the award was devoted to non-binding recommendations regarding many work-related reforms in areas inside and outside the arbitration board’s mandate. These recommendations are insightful and highly detailed, and they provide operational steps to be taken. Implementing the recommendations requires the mutual belief that a change is needed and feasible, and that it can serve the common and separate needs of the parties. In addition, the basic premise of the award is all substantial reforms must come through negotiations. It is left to be seen whether, given the present crisis in labor relations, the parties can marshal the high level of mutual respect and trust¹¹⁸ as well as the goodwill and cooperation needed to make it happen.

D. Cost and Time

The arbitration was long—almost four years—and was very costly. Admittedly, a substantial part of the delay was due to the turnover of arbitrators and the litigation. All seemed to agree the long time span was a major negative factor and interest arbitration should end within a year at most.

Throughout the four-year period, the neutral arbitrators rejected the public employers’ repeated attempts to confine the boundaries of the arbitration. The neutral arbitrators were eager to study the public health system in depth in order to form educated and feasible decisions about reforms. Thus, the material brought before the arbitrators was broad in scope and analytically rich. It consumed thousands of hours of preparation¹¹⁹ and forced the parties and the board to use experts and consultants, adding to the expense and intensifying the disproportion between the investment and the substantive outcome.

115. See State’s Position Paper at 21–22, 115–16, *Israel Med. Ass’n v. State of Israel* (Apr. 18, 2007); Arbitration Award, *supra* note 26, at 30–32, 82–84.

116. Interim Decision, May 30, 2005, LC 9/03 *Israel Med. Ass’n v. State of Israel* 40 PDA 821 [2005] (Isr.).

117. Arbitration Award, *supra* note 26, at 67.

118. Arbitration Award, *supra* note 26, at 65.

119. FINANCE MINISTRY, WAGE AND COLLECTIVE AGREEMENTS DIVISION, *THE DOCTORS’ ARBITRATION – OUTCOMES AND LESSONS 3* (2010).

E. Court-Administered Arbitration

In the arbitration practice, especially commercial transnational arbitration, a distinction is drawn between administered and non-administered, or private, arbitration. Administered arbitration refers to situations where an arbitration-provider institution other than the arbitrator manages and sometimes supervises the arbitration. The arbitration between the IMA and the public employers was meant to be non-administered, but it turned into court-administered arbitration. The National Labor Court was heavily involved in promoting and monitoring the pre-arbitration negotiations, ushering the parties into the arbitration room, appointing arbitrators, determining arbitrators' fees and cost allocation, defining the subjects that came under the jurisdiction of the arbitration board, and monitoring the internal dynamics between the neutral and the partisan arbitrators on the board. Its involvement began before arbitration started and it continued until the last days. During the early stages, the applications to the court were initiated by the IMA. By contrast, towards the end, the public employers did most of the initiating.

F. Parties' Satisfaction

When asked about their satisfaction with the no-strike arbitration model, the parties used different frameworks. The IMA looked, first and foremost, at the ten-year period under the sweeping ban on strikes, the lost dream regarding the Public Commission, and the long and exhausting road to arbitration. The Arbitration Award took the back seat. The public employers, in contrast, downplayed the fact that there were no strikes for ten years and ignored the Public Commission. They concentrated on the arbitration component of the model.

As to the Arbitration Award, the IMA was satisfied with the salary increase and its success in blocking the public employers from using the arbitration to introduce the punch clock. Notwithstanding, because the IMA saw the arbitration as bringing change and hope to doctors,¹²⁰ it was disappointed with the board's last minute reluctance to introduce reforms. On the strategic level, the no-strike arbitration model was very disappointing for the IMA and for doctors. Instead of empowering doctors and enhancing their status, the no-strike arbitration agreement damaged doctors' self-image and self-esteem.

According to the IMA leadership's narrative, the ban on striking was exploited by the public employers, resulting in grudging assent or increased resort to litigation. Both results left doctors feeling powerless. The government reneged on its obligation regarding the Public Commission, which, for the IMA, was an important element in the model. Additionally, the public employers were successful in defeating the promise of arbitration. They used exogenous

120. Arbitration Award, *supra* note 26, at 66.

factors and manipulation to ignore their obligation to submit to arbitration¹²¹ and to postpone, prolong, and subvert the arbitration proceedings. The humiliation and cynicism experienced by the doctors during the ten years led the IMA's new leadership to give up on the idea of arbitration and opt for strikes as a means of reclaiming doctors' dignity, power, and control.

In the public employers' camp, the feelings were mixed. The public employers were dissatisfied with the uneven-handed approach of the neutral arbitrators and the procedural flaws in arbitration proceedings.¹²² In addition, they protested the fact that none of the public employers' demands were accepted, primarily the punch clock,¹²³ and that the Arbitration Award contained recommendations, some of which were outside the submission and others which carried price tags that might be used by the IMA in the future.¹²⁴ The Health Ministry and the Wage and Collective Agreements Division, which were more attuned to the day-to-day, job-related problems, were cognizant that they missed a golden opportunity to introduce organizational reforms in doctors' employment patterns. This was due to lack of time and attention by the Director of the Wage and Collective Agreements Division who, during the arbitration, found himself occupied simultaneously with several strikes and an unprecedented reform involving 180,000 teachers. This left the stage open for the Budget Division to take the lead.

The Finance Ministry led by the Budget Division, which was the dominating voice in the public employers' camp, seemed to be satisfied. Traditionally, it has opposed any reforms unless they are unilaterally initiated by the Budget Division. In addition, it voiced the strongest resistance to arbitration. The result of the arbitration relieved the Finance Ministry. First, the Finance Ministry welcomed the fact that the substantive award was limited to a salary increase. Second, at the strategic level, that the arbitration was prolonged for such a long period, resulting in just one round of negotiation and a single arbitration in ten years with no retroactive payments was a major success for those who opposed the idea of arbitration. It ensured that neither the doctors nor other unions would opt for the no-strike arbitration model in the future.

VIII

DISCUSSION AND ANALYSIS

It is very difficult to evaluate and analyze the no-strike arbitration model using one round of unsuccessful negotiations and a single incidence of arbitration. Recent findings from a longitudinal study of a no-strike interest-

121. The IMA was frustrated by the government's unwillingness to enter into concession bargaining and arbitration during the economic crisis and its preference to extend the outcome of its negotiations with the Histadrut through legislation. *See supra* text accompanying note 44.

122. FINANCE MINISTRY, *supra* note 119, at 13–14.

123. Roni Linder-Ganz, *The Doctors' Arbitration Is a Mistake—They Took Good Money and Used It Badly*, MARKER, Dec. 3, 2008, at 38.

124. FINANCE MINISTRY, *supra* note 119, at 10.

arbitration regime¹²⁵ show that as parties learn to live with arbitration, there is a decrease in impasse rates and in resorting to arbitration.¹²⁶

Improved pre-arbitration negotiations or a reduced “chilling effect” and “narcotic effect”¹²⁷ are not the only expected results of repeating or extending the no-strike arbitration model. Other negative aspects that were present in the doctors’ arbitration are likely to ease over time when parties accept arbitration as a way of life. There will be less resorting to the court and a less-defensive approach to the arbitration proceedings, resulting in less-formal, shorter, and cheaper arbitrations, and less conservative awards.

As this case study demonstrated, four structural and attitudinal changes are essential to improve the performance of the no-strike arbitration model. These are (1) adding mediation as a preceding step to arbitration, (2) insisting on a regular, rather than a neutral-skewed tripartite structure, (3) changing parties’ conceptualization of interest arbitration, and (4) changing public employers’ strategic approach to power discourse.

A. Mediation—The Present But Absent Procedure

During the mediation and the post-mediation negotiations,¹²⁸ the parties rejected the idea of building two-tier impasse procedures by adding mediation as a preceding step to arbitration. The parties felt it was superfluous. They were then at the zenith of their relationship following an eye-opening experience with mediation. The underlying idea was that since all parties had learned to appreciate the value of mediation, there was no need to require mediation as a contractual obligation. In retrospect, that was a grave mistake. The idea behind investing energy in dispute-processing planning during contract formation is premised on the assumption this is the best time to devise an optimal system for resolving ex post negotiations disputes. The instant case is more proof as to the power of this assumption.

The state rejected the IMA’s suggestion¹²⁹ to use mediation in order to assist the parties in the pre-arbitration negotiations that were stalemated. The National Labor Court’s proposal to attempt mediation¹³⁰ was met with a similar response. Given that the state complained the parties had not exhausted the negotiations and the neutral arbitrators criticized the parties’ inability to negotiate, it is difficult to understand the state’s opposition to mediation. One

125. The study examines thirty years of experience with compulsory arbitration for police and firefighters in the state of New York. Kochan Lipsky, *supra* note 107, at 568.

126. *Id.* at 569.

127. The term is used to measure the rate of parties’ dependence on arbitration in lieu of reaching agreement through pre-arbitration negotiations.

128. MEDIATION AND STRATEGIC CHANGE, *supra* note 14, at 85.

129. Arbitration Hearing, July 12, 2007, Israel Med. Ass’n v. State of Israel at 40, 47 [2007] (unpublished) (Isr.).

130. Interim Decision, May 30, 2005, LC 9/03 Israel Med. Ass’n v. State of Israel 40 PDA 821 [2005] (Isr.).

possible explanation¹³¹ is that the Finance Ministry's leadership obsessively feared any encroachment on their decision-making power and felt threatened by any type of third-party intervention. More specifically, they resisted mediation since they still failed to distinguish mediation from arbitration.¹³²

Needless to say, the state's position ignores that voluntarism is one of the basic tenets of mediation and that the only common property of arbitration and mediation is the involvement of a third party. Furthermore, given that the state desired to avoid arbitration altogether or, at most, submit to arbitration only minor unresolved issues or well-defined subjects that had been previously discussed and refined through negotiations, its refusal to try mediation resulted in severe damage.¹³³ In fact, without resorting to mediation, the public employers accomplished none of their goals. Had they attended to studies showing that pre-arbitration mediation could resolve seventy to eighty percent of impasses,¹³⁴ the results would likely have been very different.

B. The Tripartite Structure

The tripartite structure is assumed to function as a complementary process for parties' direct negotiations, extending the negotiations into the arbitration stage. The structure is assumed to create an arena for intimate summit negotiations between partisan arbitrators who are actually leaders of the parties, assisted by the neutral arbitrator acting as a special mediator with a club, holding a reserve power of decision. Research findings¹³⁵ have shown that a key factor in the success and acceptability of interest arbitration is the tripartite structure of the arbitration board. It serves several functions, among them, to protect the parties and the arbitration process from ill-advised decisions, to improve the feasibility and practicality of the award, and to assist in "selling" the award to parties' constituencies. Far more important is the tripartite arbitration model's contribution to enhancing the acceptability of and commitment to the process. The summit negotiations among members of the arbitration board and the mediation by the neutral chairman¹³⁶ serve as a vehicle for parties' direct participation in the decision-making process and their control over it. This is probably the reason why post-hearing arbitration sessions are

131. This explanation was repeated during the interviews.

132. ALON, *supra* note 10, at 138-39; MEDIATION AND STRATEGIC CHANGE, *supra* note 14, at 86. Such a statement was voiced again during the interviews.

133. This conclusion is supported by the parties' descriptions of the futile pre-arbitration negotiations. See State's Position Paper, *supra* note 115, at 69.

134. Kochan Lipsky, *supra* note 107, at 571.

135. See Mordehai Mironi, *The Functional Approach to Judicial Oversight of Specialized Tribunals—A Case Study*, 52 N.Y.U. L. REV. 745, 787-91 (1977) (discussing the unique value and contribution of the tripartite structure of the arbitration board). See also KOCHAN MIRONI, *supra* note 107, at 96-105; Kochan Lipsky, *supra* note 107, at 580.

136. These summit mediation sessions frequently produce a settlement resulting in a unanimous award. In other cases, the tripartite board reaches a tacit agreement but due to political constraints the award emerges as a majority decision accompanied by a dissent. See Kochan Lipsky, *supra* note 107, at 580.

named “executive sessions,” rather than arbitration-board deliberations, and why there is universal preference among arbitrators for such a design.¹³⁷

As this case study has demonstrated, the tripartite structure of the arbitration board did not produce the expected dynamics and results. Notwithstanding, it is submitted that contrary to the Arbitration Award’s reckoning/assertion, the underlying assumptions of the tripartite design are far from naïve¹³⁸ and that a tripartite structure is an inherently superior model for arbitrating interest disputes. The structure did not perform in the instant case for two interrelated reasons: (1) the misconceptions and misperceptions as to the partisan arbitrators’ role, and (2) the neutral-skewed nature of the arbitration board.

Probably due to lack of expertise in interest arbitration and the workings of a tripartite board, the parties, neutral arbitrators, and court misunderstood the unique value and role of the partisan arbitrators. At first glance, the Arbitration Award’s rhetoric appeared to embrace the idea of partisan arbitrators. It emphasized that this was an exceptional structure in which the partisan arbitrators could serve as arbitrators, on the one hand, and cooperate with the parties and actually assume leadership positions outside and inside the arbitration room, on the other.

Nonetheless, the actual language of the award attests that the neutral arbitrators experienced difficulties in digesting the new paradigm. The award tries to force this new paradigm on the traditional arbitration model and falls into the same trap as the courts. The neutral arbitrators complain that the disengagement of the partisan arbitrators from the disputants, called for by their position as arbitrators, did not materialize. The only comfort they find is in the fact that the partisan arbitrators’ freedom to travel between the party’s chambers and the board’s podium was open, transparent, and with the knowledge of the neutral arbitrators and the parties.¹³⁹ In conclusion, the arbitrators use the bad experience in the instant case as proof of the tripartite design’s naiveté. According to the award, instead of improving the quality and dynamic of the negotiations leading to resolution by consent, the tripartite structure pushed the parties apart.

The conclusion reflects yet another misunderstanding shared by the neutral arbitrators and the state’s counsel regarding the true value of the tripartite design. They failed to distinguish among the four possible negotiation configurations: (1) pre-arbitration direct negotiations between the parties;¹⁴⁰ (2)

137. *Id.*

138. The award wrongly claims that the tripartite structure is naïve. *See* Arbitration Award, *supra* note 26, at 3.

139. *Id.*

140. The state’s counsel appeared to be the strongest supporter of the tripartite structure. He believed that the partisan arbitrators were supposed to soften the adversarial nature of the parties’ discourse. State’s Position Paper, *supra* note 115, at 45.

parties' direct negotiations during arbitration;¹⁴¹ (3) parties' assisted negotiations during arbitration using the neutral arbitrators as mediators;¹⁴² and (4) assisted post-hearing summit negotiations between partisan arbitrators, during executive sessions, using the neutral arbitrators as mediators.

A tripartite arbitration board may indeed encourage the parties to negotiate or offer its services as a mediator. Nonetheless, as stated, the tripartite design's unique value has been in the fourth configuration, that is, assisted post-hearing summit negotiations between partisan arbitrators. The best way to maximize this value is by using a straight tripartite, not a neutral-skewed, arbitration board.

When the option of contract-renewal arbitration was discussed during mediation, the public employers searched for ways to protect themselves from ill-advised and highly problematic awards.¹⁴³ The measure finally selected provided for an optional neutral-skewed tripartite composition of the arbitration board. According to the interviews, the public employers' assumption was that such a board would act more responsibly and with greater accountability than a tripartite board with a single neutral chairman. In retrospect, proposing this option was a grave mistake.

As expected, the parties opted for a neutral-skewed board, which probably enhanced the public employers' confidence. At the same time, the neutral-skewed composition destroyed the unique value of the tripartite design for interest arbitration. The arbitration board did not conduct post-hearing "executive sessions" devoted to summit negotiations among the members of the arbitration board and to mediation by the neutral chairman. Instead, the neutral arbitrators engaged in deliberations in which the partisan arbitrators were invited to provide information and consultation. The neutral-skewed tripartite board was arguably the single most important structural flaw; it should be avoided at all cost in the future.

C. The Essence of Interest Arbitration

The Arbitration Award suggests two explanations for the narrow approach adopted in the substantive part of the award. First, labor contract-renewal arbitration is an economic (interest) dispute. Hence, the arbitrators are not allowed to unilaterally decide on reforms or to change work practices without specific authorization bestowed upon them through parties' full consent.¹⁴⁴ Second, decisions in interest arbitration, including decisions relating to wage increases, are by definition inferior in terms of clarity and ability to implement¹⁴⁵ to decisions arrived by parties' mutual consent. According to the Arbitration

141. *Id.*; See also Arbitration Award, *supra* note 26, at 4.

142. Arbitration Award, *supra* note 26, at 49.

143. One suggestion was to give the Prime Minister veto power in case an award endangered the economy. See MEDIATION AND STRATEGIC CHANGE, *supra* note 14, at 41-42.

144. Arbitration Award, *supra* note 26, at 25.

145. *Id.* at 26.

Award, a unilateral arbitration decision is a less suitable medium for dealing with evidentiary, substantive, and technical issues¹⁴⁶ associated with salary and working conditions. Consequently, in comparison, an agreement arrived at through bilateral negotiations stands a better chance of being implemented, in all aspects, than a unilateral arbitration award.

The basic premise that decisions arrived at by parties' mutual consent are always preferable to those imposed by third-party decree is beyond dispute. However, the two explanations given by the arbitration board for the extremely narrow reading of its authority reflect an incorrect conceptualization of interest arbitration. Characterizing an interest arbitration award as a unilateral decision is conceptually wrong in general, and under a tripartite-arbitration-board model, in particular. In addition, it is unwarranted. The first explanation runs against basic tenets of arbitration law and practice; the second relies on an incorrect depiction of labor negotiations.

An interest arbitration award, especially one produced by a tripartite board, is not a unilateral decision in the general sense and certainly not as the term is used in industrial and labor relations.¹⁴⁷ The parties by mutual consent select the arbitration board and empower it to make a final and binding decision if they fail to reach agreement on their own. The tripartite arbitration board is an agent or proxy of both parties. It is asked by them jointly to draft a single document establishing a new set of rights and duties to govern their relationship, through a process that allows them direct participation. Quite often, the arbitration award is submitted for registration or is deemed by law to be a bilateral collective agreement.¹⁴⁸

The notion that arbitrators are not allowed to decide on a subject in dispute without specific authorization provided for through parties' full consent is also unwarranted. True, case law on arbitration in Israel has adopted a peculiar approach toward the arbitrator's authority to decide whether a particular subject comes under the submission or jurisdiction of the arbitrator. When the duty to arbitrate is not in dispute, arbitration law in the United Kingdom¹⁴⁹ and in the United States,¹⁵⁰ including labor arbitration,¹⁵¹ grants the arbitrator power to determine what issues fall within the scope of the arbitration. In Israel, in

146. *Id.* at 33–34, 37.

147. JOHN BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY AND VOICE* 89–91 (2004).

148. *See, e.g.*, Settlement of Labour Disputes Law, 5717–1957, 11 LSI 51, 56 (1957) (Isr.). *See* Mironi, *Arbitration as Strike Substitute*, *supra* note 113, at 172–73 (explaining the implementation procedure in Alberta). The no-strike arbitration agreement provides that the arbitration award will be registered as a collective agreement.

149. David St. John Sutton, John Kendall & Judith Gill, *RUSSELL ON ARBITRATION* 59–60, 199 (25th ed. 1997).

150. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); TIBOR VÁRADY, JOHN J. BARCELÓ & ARTHUR T. VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE* 134, 140, 207 (4th ed. 2009).

151. *See* THE DEVELOPING LABOR LAW 1416–23 (Patrick Hardin & John E. Higgins, Jr. eds., 5th ed. 2006).

contrast, this question is left for the court to decide unless a special authorization is granted to the arbitrator either by agreement or statute.¹⁵² The arbitration board overlooked the fact that the Settlement of Labor Disputes Law of 1957 provides for such authorization.¹⁵³ If the general rule was insufficient, the National Labor Court proclaimed it loud and clear. Referring to the instant case, it said in cases of dispute, the arbitration board has the authority to exercise its own discretion in deciding which subjects come under its jurisdiction, as is commonly done in arbitration.¹⁵⁴

The idea that parties' consent is always superior to a third-party decision is a normative principle that runs through the literature on ADR¹⁵⁵ and in labor-dispute settlements.¹⁵⁶ The criticism is against the Arbitration Award's assertion that an agreement arrived at through labor negotiations is always clearer and easier to implement than an arbitration award. The reason given is that negotiators are in a better position to foresee and deal with the interrelationships and ramifications of the issues under consideration.¹⁵⁷ This explanation is unsupported, in general, and highly inappropriate in this particular case.

Agreements arrived at through collective bargaining, especially under threat of strike or during a strike,¹⁵⁸ are rarely clear, complete, and easy to implement.¹⁵⁹ This is why the agreement is constantly supplemented and rewritten through the contract administration,¹⁶⁰ and through institutions such as the grievance procedure¹⁶¹ and the bipartite follow-up committee.¹⁶² Quite often, decision-makers in interest arbitration may have less pressure, more time, and greater resources than their counterparts who act under a threat or during strike. As a result, the former are more likely to come up with a much clearer,

152. See OTTOLENGHI, *supra* note 66, at 583–85.

153. Settlement of Labour Disputes Law, 1957–5717, 11 LSI 51, 54 (1957) (Isr.).

154. See Interim Decision, Aug. 7, 2005, LC 9/03 Israel Med. Ass'n v. State of Israel 40 PDA 821 [2005] (Isr.).

155. Carrie Menkel-Meadow, *Towards Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 454, 457 (1984); KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 169–70 (2001); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* 21–33 (1987).

156. Jonathan Harkavi, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 157 (1999); KOCHAN MIRONI, *supra* note 107, at 5–6.

157. Arbitration Award, *supra* note 26, at 33–34.

158. JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 162 (1988).

159. ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* 541 (1976); Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1493, 1498–99 (1959).

160. DANIEL QUINN MILLS, *LABOR MANAGEMENT RELATIONS* 562–63 (5th ed. 1994).

161. LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, *ADR IN THE WORKPLACE* 16–18 (2000); GETMAN & POGREBIN, *supra* note 158, at 161–68; ARCHIBALD COX, DEREK CURTIS BOK & ROBERT A. GORMAN, *LABOR LAW: CASES AND MATERIALS* 714–16 (13th ed. 2001).

162. Such procedure for implementation is provided for in the no-strike arbitration agreement and in the award. Arbitration Award, *supra* note 26, at 48.

thoughtful, and easy to implement decision. In addition, the partisan arbitrators are there in order to make sure all interrelationships and ramifications are fleshed out and addressed. This was especially true in the instant case. No negotiations could match the time and resources invested by the arbitrators and the parties in discussing and analyzing the issues. Furthermore, in terms of clarity, thoughtfulness, and readiness for implementation, the detailed and insightful recommendations contained in the award were second to none.

The story of the four integrative issues that had been left open for continuous negotiations in the 1994 agreement¹⁶³ and have been left unresolved in the arbitration is an illuminating example. The problem of the public employers and the IMA does not lie in analyzing interrelationships and ramifications, but rather in “deciding,” that is, in negotiating to conclusion. Interest arbitration conducted by a tripartite arbitration board is the only known cure for this kind of problem.

D. Power-Based Versus Reason-Based Discourse

Studies indicate that employers' negative attitudes towards compulsory arbitration explain the relatively low level of acceptability assigned by public-sector employers to the arbitrators, the arbitration process, and the outcomes.¹⁶⁴ Employers who are ideologically opposed to arbitration tend to circumvent and prolong the arbitration and are more likely to resort to courts during the arbitration proceedings, and ex-post, in order to quash the award.¹⁶⁵

It was the Prime Minister's decision to adopt the no-strike arbitration model at the end of the mediation. With the exception of the Director of the Wage and Collective Agreements Division and his legal counsel, all those in power positions with the state and other public employers, particularly the Finance Minister and the Budget Division at the Finance Ministry, were vehemently against this. In their narrative, the no-strike agreement was akin to compulsory rather than to voluntary arbitration. Their opposition only strengthened over time.¹⁶⁶ They resisted the very idea of relinquishing public employers' power to make decisions as to labor cost¹⁶⁷ and to replace the power-based discourse with reason- or equity-based discourse.¹⁶⁸ With the Prime Minister out of office and the two senior supporters of arbitration leaving the Finance Ministry, the arbitration ship left shore stripped of public employer commitment and support.

163. The four integrative issues were rotation of department heads and heads of units, organizational reforms of emergency rooms, organizational restructuring of hospitals by creating divisions, and continuing education.

164. KOCHAN MIRONI, *supra* note 107, at 146–52.

165. *See, e.g.,* Mironi, *The Functional Approach*, *supra* note 135, at 163 (chronicling the case of the Nassau County police arbitration).

166. ALON, *supra* note 10, at 170.

167. State's Position Paper, *supra* note 115, at 35.

168. ALON, *supra* note 10, at 177.

In the interviews, public employers' representatives declared that even though they had bitterly fought against the idea during the mediation, nonetheless, once the no-strike agreement was signed, they truly accepted the model. They were willing to give the arbitration a fair chance, provided it was conducted properly.

These declarations were incongruent with the ideological opposition of those who were actually leading the public employers' side¹⁶⁹ throughout the arbitration; nor were these declarations supported by the public employers' statements¹⁷⁰ or overt behavior throughout the arbitration.¹⁷¹ This attitude was not only a source of frustration for the IMA, the courts, and the neutral arbitrators. It is probably the single most important behavioral variable explaining why the IMA and other unions do not see arbitration as an acceptable dispute-resolution procedure and why the doctors' arbitration was labeled "handicapped arbitration."

Without attitudinal change, every experiment with interest arbitration is doomed to fail. There are two possible roads to deal with public employers' ideological opposition to using interest arbitration as a strike substitute, including in essential services: challenge its underlying reasoning and offer a new paradigm.

The opposition to interest arbitration rests on two grounds: (1) resistance to relinquishing power to make public-spending decisions to non-governmental, non-accountable private individuals; and (2) preference for power-based discourse over reason- and equity-based discourse. What it boils down to is the Finance Ministry's desire to retain the ultimate power and control.

The accountability argument is in fact a fig leaf. No Finance Minister or senior officer has ever been held accountable for ill-advised or disastrous concessions in labor negotiations.¹⁷² Furthermore, repeated studies have shown no significant differences between negotiated and arbitrated outcomes.¹⁷³

169. The first arbitration session took place after the two senior officers in the Finance Ministry who had supported the idea of arbitration left office. The long period taken by the government to appoint a new Director of Wage and Collective Agreements Division and the fact that he brought to office neither a background in public-sector labor relations nor experience, enabled the Budget Division to assume a leadership position and to dictate the state's and other public employers' approach towards the arbitration.

170. See Interim Decision, May 30, 2005, LC 9/03 Israel Med Ass'n v. State of Israel at 5 [2005] 40 PDA 821 (Isr.).

171. The courts, the arbitrators, and the IMA leadership all felt that the state and public employers were using various means to postpone, prolong, and obstruct the arbitration; to make it insignificant and meaningless; and to lay down an infrastructure for quashing the arbitration award. See Arbitration Award, *supra* note 26, at 66; Interim Decision, Aug. 7, 2005, LC 9/03 Israel Med. Ass'n v. State of Israel at 3 [2005] (unpublished) (Isr.); Interim Decision, Aug. 25, 2005, LC 9/03 Israel Med. Ass'n v. State of Israel at 2 [2005] (unpublished) (Isr.); Interim Decision, June 5, 2008, LC 12/08 Israel Med. Ass'n v. State of Israel at 2-3 [2008] (unpublished) (Isr.); Arbitration Session, July, 10, 2008, Israel Med. Ass'n v. State of Israel at 14 [2008] (unpublished) (Isr.); ALON, *supra* note 10, at 258, 264.

172. For instance, this includes the sixty-percent salary increase granted to the IMA in 1994. The Finance Minister had been highly criticized for the 1994 deal, which many claimed had dismantled the government's restrictive wage policy and swept the entire public sector into an unnecessary wave of

The argument regarding the superiority of power discourse and the importance of retaining control is not likely to withstand the pressure of a painful strike in essential services. Past experience has indicated that under such circumstances, power-based discourse may lead to concessions that exceed those that could have been decided through arbitration using reason- and equity-based discourse. Furthermore, during strikes in essential services, the Finance Ministry may not retain power and control anyway since it will be taken away by the Prime Minister.¹⁷⁴

In conclusion, from the Finance Ministry's standpoint and as far as essential services are concerned, interest arbitration is preferable to a power struggle. It may produce as good or better substantive outcomes and is a much better safeguard against the possibility of losing power and control.

Another and more promising road to overcoming public employers' opposition is offering a new way to reframe the strategic approach towards interest arbitration. The reframing is three-pronged and consists of the following: First, conceptualize interest arbitration by a tripartite arbitration board as a third step in a multi-step dialogue or negotiations. The first step in the dialogue is direct negotiations; the second step is mediated negotiations, and the third, mediated summit negotiations. Being a form of negotiations or dialogue, interest arbitration may not entail relinquishing decision-making power. Next, recognize that strategic, interest-based negotiations are more efficient and may produce better and more sustainable outcomes than power discourse. Finally, accept that multi-step negotiations are the best road to transforming adversarial, positional, and power-based negotiations into strategic and interest-based negotiations.

IX

CONCLUSIONS AND DISCUSSION

It is safe to conclude both parties have no strong desire to extend the period of the no-strike arbitration agreement, which created a sheltered, non-violent, and strike-free environment for the public, for the doctors, and for the employers. The interviews establish that both parties are opting for non-

salary increases. Nonetheless, he neither resigned nor was removed from office. In fact, he was reappointed.

173. Kochan Lipsky, *supra* note 107, at 571–79. Another longitudinal study of police wages reported that neither the presence of arbitration nor the use of arbitration had led to escalation of wages beyond the wage level negotiated in other states without arbitration. See Orley Ashenfelter & Dean Hyslop, *Measuring the Effect of Arbitration on Wage Levels: The Case of Police Officers*, 54 INDUS. & LAB. REL. REV. 316, 316–28 (2001).

174. In two recent instances, that is, the high school teachers' strike and the senior academic staff strike, the Finance Ministry, which has traditionally been against arbitration, cynically suggested submitting the dispute to arbitration. This was simply a means of resuming power and control. It had discovered that the Prime Minister was about to intervene in a strike and to close a deal with the relevant minister over the Finance Ministry's head. Relying on the experience of the doctors "handicapped arbitration," the two unions refused.

renewal for similar reasons—loss of power and control. On the basis of this study, it appears that the state and the public employers did not give the no-strike arbitration model a fair chance. It is a pity to see that both parties are unwilling to give the experiment another chance. They chose to base their final judgment on a single round of negotiations and one arbitration proceeding that began and was conducted under unusual and negative exogenous events.

The decision not to extend the no-strike arbitration agreement is especially disappointing not only because it was the most innovative experiment in Israel's labor relations, but also because of the particular context—doctors in public healthcare. In view of the special context, arbitration is the only viable strike substitute. Going back to power-based discourse and using strikes as the arbiter is problematic for the doctors as well as for the government. If the parties are still debating their policies, here are some thoughts they should revisit.

The disputes between the IMA and the government have never been only about money. They have been about voice, the future status of public healthcare, and the doctors' professional quality of life. Strikes, especially escalated strikes, are unlikely to provide a real voice or improve the status of public healthcare or the status of doctors. Moreover, the right to strike needs to be reframed in the context of the doctors' moral obligations towards their patients.

Doctors are not typical employees, nor are they typical essential employees. Doctors' intimate contact with their patients and the immense power and control they have over patients' lives and well-being put the doctors in an unusual position. They will often find it difficult to give up power and control; in this case, the control over the decision whether and when to use the power of strike. At the same time, these special relationships constrain their ability to actually exercise their right to strike. Considering these inhibitions, the doctors face unique constraints in using strikes or the threat of strikes to exert pressure in contract negotiations.

The no-strike arbitration model gives the doctors a voice and relieves them of the difficult moral dilemma of whether to strike. It takes away the power to strike without leaving them voiceless and powerless; depending on the whim of public employers. The state and other public employers relinquish their decision-making power and entrust neutral arbitrators who are not public officials with the authority to make binding decisions regarding doctors' salaries and working conditions. That doctors are the only group of professional employees whose labor relations operate under this model may not only shield their achievement from claims based on parity, but it also can enhance the doctors' status.

The government's inclination not to extend the no-strike arbitration agreement is not only wrong on normative or moral grounds; it is also functionally inconceivable. For the government not to make serious efforts to eliminate doctors' strikes is also a form of violence, albeit passive, permitting interference in the medical well-being of the citizenry. The Arbitration Award

concluded that public healthcare had not been able to respond to the changing environment; further, it noted that strategic and systemic reforms were long overdue. The Finance Ministry has traditionally refused to recognize the IMA as a legitimate partner for negotiating strategic and systemic changes in the public healthcare system or in the allocation of public resources to it.

Nonetheless, the only way out of stagnation is by giving the IMA a voice. There is the duty of information and consultation on non-mandatory subjects for bargaining as well as the duty to negotiate on impact.¹⁷⁵ In addition, many of the badly needed organizational changes are job-related and could not be introduced without IMA's consent and cooperation. Consequently, in addition to securing industrial peace, an arbitration award might bring about gains for the employers, gains which they had been unable to achieve through regular negotiations.¹⁷⁶

Finally, at the public-policy level, the government took a historic step in 2000 by assuming leadership in experimenting with a model of non-violent, consensual conflict resolution in healthcare. It should not discard it so easily. Clinging wholeheartedly to the no-strike arbitration model and giving it a better chance will reflect governmental commitment to change in the power-based, labor-relations dispute-resolution culture.

Last but not least is the incomprehensible refusal of the state and public employers to accept repeated offers to use mediation. As the experience with mediation in 2000 demonstrated, the IMA and the public employers were unable to reach settlement on their own during two years of direct negotiations and ten weeks of strike. The shift to assisted negotiations changed it all. Mediation was extremely effective in transforming the discourse and assisting them in reaching an unusually efficient and interest-based agreement.

The negative experience with pre-arbitration negotiations in the instant case, the abortive attempts to negotiate throughout the arbitration, and the recorded success of mediation elsewhere¹⁷⁷ reinforced the conclusion that mediation was badly needed. The state and other public employers' refusal to use mediation was contrary to their interest. As can be discerned from the state's petitions to the arbitration board and the courts, the failure to make some progress through negotiations harmed the public employers' interests in the post-negotiations arbitration. Furthermore, provided that public employers' reluctance to commit to the arbitration process was partially based on risk aversion, mediation is the only means for risk reduction or avoidance when parties reach impasse in negotiations. It is rather unfortunate that ten years after the doctors' mediation, and with all the progress mediation and ADR have made in Israel, the Finance Ministry leadership is still hostile to mediation and

175. LA 1013/04 Discount Bank Ltd. v. Histadrut [2004] (unpublished) (Isr.); LA 400005/98 Histadrut v. State of Israel 35 PDA 103, 120 [2000] (Isr.).

176. This is especially true now since future arbitration boards will be able to use the Public Commission and Arbitration Award's well-thought-out and detailed analysis and recommendation.

177. See *supra* text accompanying note 134.

confuses it with arbitration. Clearly, much educational work still needs to be done.

X

EPILOGUE

How can one judge the experiment in terms of it being a peaceful out-of-court resolution? In one sense, it was peaceful. There was no escalation in the strike throughout the mediation and not one incidence of strike or job action during the period of ten years following the no-strike arbitration agreement. As such, the agreement contributed to the health and welfare of the public and to the stability of labor relations in the public sector and the public healthcare system.¹⁷⁸

If peacefulness refers to the relationship between and among the parties, there were two distinct periods. The level of peacefulness was relatively high during the mediation phase and the level of cooperation, openness, and trust grew over time as the mediation progressed. It reached its climax during the ex-post negotiations over the arbitration model.

The opposite is true regarding the ten years under the no-strike arbitration agreement. Instead of peacefulness, this period has been characterized by a high level of animosity, frustration, and distrust, which grew during the arbitration stage and even produced acrimony in the relationships with the neutral arbitrators.

“Out of court” is seemingly an irrelevant criterion for the system under investigation, for these disputes were not legal or rights-based disputes but rather interest and non-justiciable disputes. Nonetheless, because the arbitration stage was far from peaceful, the parties found themselves frequently in the National Labor Court, which gave no less than eight decisions and additional interim decisions. The court had to usher and, at times, force the public employers into the arbitration hall and it undertook an active role in the administration of the arbitration until the very last minute.

This story that started as a celebration and salute to ADR and mediation in healthcare is devoid of a happy ending. It is safe to conclude that both parties have no desire to extend the period of the no-strike arbitration agreement. Consequently, unless something unexpected happens, the no-strike arbitration model that was praised by the court and others as being innovative,¹⁷⁹ pioneering, unique,¹⁸⁰ and unprecedented,¹⁸¹ as well as being a promising strike

178. Arbitration Award, *supra* note 26, at 35.

179. LC 12/08 Israel Med. Ass'n v. State of Israel at 11, 15 [2008] (unpublished) (Isr.).

180. *Id.* at 9.

181. *Id.* at 15; Arbitration Award, *supra* note 26, at 66.

replacement for essential employees,¹⁸² a new model of labor relations,¹⁸³ and a breakthrough in Israeli labor relations¹⁸⁴—but was not given a fair chance to prove itself—will now rest in peace.

182. Arbitration Hearing, July 12, 2007, Israel Med. Ass'n v. State of Israel at 34 [2007] (unpublished) (Isr.); Arbitration Hearing, June 10, 2008, Israel Med. Ass'n v. State of Israel at 18 [2008] (unpublished) (Isr.).

183. Arbitration Award, *supra* note 26, at 67.

184. Interim Decision, May 30, 2008, LC 9/03 Israel Med. Ass'n v. State of Israel at 6 [2008] (unpublished) (Isr.); Interim Decision, June 24, 2008, LC 12/08 Israel Med. Ass'n v. State of Israel at 15 [2008] (unpublished) (Isr.).

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