

ISRAEL

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I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

i General overview

The Class Action law 2006 (the Law) governs the filing and litigation of class actions in Israel. The enactment of this law in 2006 created a revolution in the field of class actions in Israel and promoted the field immensely. In addition to the Law, Regulations (the Regulations) were enacted to facilitate all procedural aspects of class action adjudication.

The number of class actions filed each year has increased dramatically since the enactment of the Law in 2006. According to unofficial statistics, approximately 7,000 class actions were filed in 2011, 1,200 in 2013, 1,500 in 2015 and 1,250 class actions were filed in 2018.

The vast majority of class actions are in the fields of product liability and consumer rights (approximately 60 per cent), approximately 13 per cent against government organs (such as municipalities and the Tax Authority), 3 per cent in each of the fields of banking and insurance and 2 per cent in each of the fields of securities and antitrust or competition.

Despite the widespread use of class actions in Israel, in practice only a small number are adjudicated on the merits. Most class action proceedings end by way of either: (1) compensated withdrawal (i.e., the case is dismissed with minor compensation for the lead plaintiff and minor attorney fees); or (2) settlement, which includes substantial compensation to the represented group.

ii The legal system – professional judges, no juries

Israel's legal system is based on professional judges. There are no jury trials in the Israeli legal system.

Class actions are typically heard before a single judge, who will determine all questions of fact and law regarding the certification motion, the action, and the extent and nature of damages and other remedies.

Class actions are considered a very important tool in the Israeli legal system, especially as an efficient instrument of 'civil enforcement' of laws. Israeli courts, including the Supreme Court, already acknowledged the class action as an important tool in protecting the interests of consumers, investors, insured people and clients of various corporations, service providers and manufacturers.

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iii The Law – general

The Law which was enacted in 2006 is a detailed and comprehensive statute governing all class action in Israel. That Law aims to create a balance between the competing interests and rights of the general public and the corporations.

The Law reflects the basic proposition that a class action is not just a procedural method for handling claims, but first and foremost an apparatus for promoting the public interest, with the understanding that valuable class actions should be promoted and encouraged.

II THE YEAR IN REVIEW

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III PROCEDURE

i Types of action available

The Law Provides that ‘no class action will be filed other than in a claim set forth in the second Addition or in a matter set forth in an explicit provision of law permitting to file a class action’.

Therefor a class action will be approved only if it falls within the statutory list of the specific causes detailed in the Second Addition to the Law. However, these causes are defined in a broad and general language and they are interpreted in a flexible manner by the courts.

The Second Addition to the Law sets forth a closed list of issues and subjects with respect to which a class action may be filed. These include, inter alia: (1) a claim against a ‘dealer’ (as defined in the Consumer Protection Law 1982: a person selling products or providing services by way of occupation, including a manufacturer) with regard to a matter between this person and a client; (2) a claim against an insurer, an insurance agent or a provident fund management company, regarding a matter between them and a client; (3) a claim against a banking corporation, regarding a matter between it and a client; (4) a claim based on a cause of action pursuant to the Antitrust Law 1988; (5) a claim based on a cause of action deriving from the ownership, possession, purchase or sale of securities or investment units; (6) a claim regarding an environmental hazard (as defined in the Prevention of Environmental Hazard Law 1992); (7) a claim based on a cause of action under the Prohibition of Discrimination in Products, Service and Entrance to Entertainment and Public Places Law 2000; (8) a claim regarding a cause of action under various labour laws and regulations; (9) a claim against a public authority for restitution of payment unlawfully collected as a tax, toll or other mandatory payment; and (10) a claim against an ‘advertiser’, as defined in the Communications Law (Telecommunications and Broadcast) 1982, **which is in the Israeli Anti-Spam Act.**

Some of the causes might be relevant and of interest to international corporations operating in Israel, among which are: claims related to securities or trading platforms; claims against banks and insurance providers and agents; anti-trust (competition) claims, including ‘follow-ons’; claims against manufacturers, distributors and service providers, including product liability claims and various claims against telecommunication and internet platform providers; claims concerning environmental damages or nuisances; and claims concerning the anti-spam amendment to the Communications Law (Telecommunications and Broadcasts) 1982.

ii Commencing proceedings

The petition to certify a class action

A class action is filed to court by submitting a motion to certify a claim as a class action. The first stage (the adjudication of the motion to certify) is handled as a separate trial within a trial, and can last two to three years in the district court on average. Unless a motion to dismiss was filed by the defendant and was approved by the judge, the court will hear evidence and decide upon various petitions, such as motion for discovery.

A class action is initiated by a plaintiff submitting an individual claim, which must be based on the plaintiff's own individual cause of action, together with a motion for certification of the personal claim as a class action (a certification motion). In the motion, the plaintiff requests approval to serve as a lead plaintiff acting on behalf of the entire class. Only after approval is granted by the court can the claim proceed as a class action.

The Law does not require any prior notice to the potential defendant, although case law has ruled that in specific circumstances the lack of prior notice is a relevant consideration.

The filing of a class action is subject to the court's approval and discretion, and requires that several conditions be met:

- a* the action must raise material questions of fact and law that are common to all members of the represented group (i.e., to 'the group' or 'the class');
- b* there is reasonable possibility that the shared legal and factual issues will be decided in favour of the group;
- c* a class action will be the just and efficient way of resolving the dispute under the circumstances of the case; and
- d* there are reasonable grounds to assume that the interest of all members of the group will be represented and managed properly and in good faith.

In order to certify a petition to approve a class action the court must be satisfied that plaintiff has provided a sufficient preliminary evidence to substantiate the core arguments of the class action, and that there is a reasonable basis to assume that the common questions of fact and law, will be resolved in favour of the class.

The Registry of Class Action

Pursuant to article 28 of the Law, there is a public electronic database in Israel known as the Registry of Class Action. This database is compiled by the Ministry of Justice and contains information about every class action, from the filing of the certification motion and until the conclusion of the proceedings.

The Law requires a party filing a certification motion to examine – prior to filing the class action – in the Registry of Class Actions, to make sure no previous same or similar class action was filed (i.e., raising material questions of fact or law that are the same or similar to the questions raised in the certification motion). And if so, and the lead plaintiff still chooses to file the motion to certify the class action, he or she must notify the court about the previous claim, and the reason why he or she still believes this is a different and unique case.

The plaintiff

The Law permits the filing of a class action not only by an individual or corporation, but also by a public authority with respect to a claim in the scope of one of its public goals. In addition, any qualified non-profit organisations and government commissions can file a class

action with respect to a claim in the scope of one of its public goals, provided that under the circumstances of the matter there is a difficulty in filing the action by a person possessing a personal cause of action.

The Law does not require a minimum number of class members. However, case law provides that the court may exercise its discretion to refuse to certify a class action in the event that the number of class members is too small. The law allows several subgroups to be included as part of the group.

According to Israeli law, a group claim (as opposed to a class action) is possible in the event the names and identities of all plaintiffs are known to the organiser and they wish to be part of the claim. In contrast, a class action is on behalf of a group when the lead plaintiff (the one who files the class action) does not know the names and identities of the co-members in the group.

The class and its definition

The class must be defined, initially, by the plaintiff. However, in the course of hearing the motion to certify the class action, the court has considerable discretion to change and redefine the class and create subclasses. The final definition of the class will be set out in the court's ruling to approve the class action.

Opt-out

The default mechanism for a class action is the opt-out mechanism, meaning that upon approval of the claim as a class action, all individuals meeting the definition of the group, as approved, will be part of the group, entitled to the compensation or rewards to be paid to the group members, but also bound by the outcome of the proceedings, unless they ask to opt-out. Any potential group member is entitled to notify court that he or she wishes to opt out.

In special circumstances, the court may, at its discretion, rule that the action be conducted on an opt-in basis, which means that the proceeding will relate only to those class members that specifically request to be included in the group.

iii Procedural rules

Remedies

In general, the court may award – in a class action – any appropriate remedy applicable pursuant to the law governing the cause of action on which the class action is based, including monetary reward or compensation (individual or class compensation) and injunctive relief or declaratory relief, or both, with the exception of punitive or statutory damages that may only be awarded in class actions concerning the Equal Right to the Disabled Act 1998 and the Television Broadcast (Subtitles and Sign Language) Law 2005.

Discovery

There is no general document discovery in the motion to approve the class action.

In the scope of adjudicating the motion for class certification, the court may allow document discovery, but the plaintiff will have to convince the judge that several conditions are met in the specific circumstances of the case: first, that the documents requested to be disclosed are relevant to the class action; second, that the approval of the disclosure is

necessary for the certification of the class action; and third, that the plaintiff provided prima facie evidence regarding a valid cause of claim and of damages caused personally to the lead plaintiff, and potential damages to the class.

Israeli courts are rather reluctant in allowing class actions' plaintiff disclosure of documents and information from the defendants. Thus, the defendants' position in class actions is dramatically better and easier in Israel than in the US, where discovery is an integral part of the class action certification process.

Rules of non-disclosure, privilege, and other confidentiality considerations

Frequently the defendants will argue against discovery on the basis of, inter alia, secrecy, privilege, infringement of trade secret and intellectual property rights.

The same rules that apply to general civil proceedings apply with respect to class action proceedings. Israeli law has several privileges that are statutory, some of which are absolute (such as attorney–client privilege), and some are relative and subject to the court's discretion (such as doctor–patient privilege).

In addition, there are types of privilege that are based on case law, such as the privilege of documents prepared for trial, which are relative.

With regard to confidentiality, the Regulations provide that if the court orders the disclosure and review of documents, it may give instruction in order to maintain confidentiality of the documents that will be provided to the plaintiff and his or her attorney.

With regard to the non-disclosure of trade secrets, the ordinary rules that apply under general law with respect to disclosure and document review are applicable to class actions.

A common way of balancing between the disclosure obligation and the prevention of harm of the same interests is the transfer of the confidential information subject to a confidentiality undertaking of the plaintiff and his attorney.

Mechanisms and strategies available to class-action defendants

Defendants in class actions have several possible strong arguments to make in response to the certification motion, such as that the claim is not included among the claims for which a certification motion can be filed, as listed in the Second Schedule to the Law. In addition, and subject to the specific circumstances of the case, the defendants may argue (1) that the lead plaintiff lacks a personal cause of action or there is no dispute between it and the defendant; (2) the statute of limitations; (3) lack of damage; (4) *de minimis*; (5) that the class is not appropriate for litigation as a class action because it does not satisfy the conditions set forth by the Law.

Settlement

Any settlement of a class action proceeding requires court approval. If the court find the proposed settlement to be prima facie reasonable and meet certain key parameters, it will order that the parties will be publicised it in two daily newspapers to allow group members to know about the proposed settlement and have a right to object to it. Each member of the group is entitled to object to the proposed settlement and file his or her objection with the court. In the event his or her objection is approved by the judge, and the proposed settlement is corrected as a result, the judge may order the parties to pay him or her a 'reward'.

In addition, a copy of the proposed settlement will be sent to the Attorney General, so he or she can advise the court about his or her position regarding the proposed settlement. The Attorney General is regarded as the keeper of the public interest with respect to any settlement.

In addition to the Attorney General, any government authority relevant to the claim, as well as any class member, qualified non-profit organisation or person who acts in general for the benefit of the class members, has legal standing to file an objection to a proposed settlement within 45 days of its publication notice. According to a recent amendment to the Law, if the court accepts an objection in full or in part, it may order that a 'reward' be paid to the objector.

Class members who wish to opt out of the proposed settlement may request leave from the court to do so.

The Law instructs that a court will approve a proposed settlement only if it is satisfied that the settlement is fair, adequate and reasonable, and that finalising the proceedings by way of settlement is the most fair and efficient for resolving the dispute under the circumstances.

In the process of evaluating the proposed settlement, the court may appoint an 'examiner' (i.e., an expert in the class action relevant field), who will operate as an 'officer of the court', and advise the judge on the proposed settlement. The examiner may advise or suggest ways to improve or change the settlement. Often, the examiner is a CPA or economist, and many times his main contribution is in examining the settlement from the financial/monetary point of view, that is, evaluating the real financial value of the settlement or the real contribution by defendant and the real cost of the settlement to the defendant.

The examiner is authorised to summon the parties for a hearing or suggest variations to the proposed settlement.

The court may provide the attorney for the lead plaintiff with specific instructions for supervision of the settlement's execution, and may also link the execution and fulfilment of the settlement with the payment of legal fees to the plaintiff's attorney and the reward for the lead plaintiff.

Withdrawal from class action

Many class actions, especially those that are without merit, come to an end by way of withdrawal, sometimes a compensated withdrawal. According to the Law, a withdrawal of the plaintiff from the class action is subject to the approval by the court, after it is satisfied that the plaintiff and his attorney has not been paid or gain any other hidden benefits from the defendant. In the event the withdrawal is compensated, the plaintiff and his or her attorney must declare by affidavits what is their suggested compensation.

Funding of class actions

The Law and Israeli law generally do not prohibit third party funding of proceedings, and the same applies to class actions.

Private funds have been established in Israel in recent years for funding class actions. However, there are no public records or data with regard to the scope of third party funding. According to the Law, there is no obligation to notify the court about this funding.

In addition to third party funding, through private funds, the Law established the Fund to Finance Class Actions, which is a public fund that aims to assist private individuals, lead plaintiffs and organisations in funding class actions of public or social significance.

However, this governmental fund was not very efficient, and to date the assistance it provided for class action was very minor and insignificant.

Unlike the governmental fund, the Israel Securities Authority (the Israeli equivalent to the American SEC) created a more effective mechanism for supporting securities class actions, and their contribution in this field is more significant.

Court fees

According to an amendment to the Law enacted in 2018, the filing of class actions requires payment of court fees, where until this amendment class action was exempt from court fees.

As a rule, Israeli legal procedure provides that the filling of any civil actions is subject to payment of court fees equal to 2.5 per cent of the claim amount. However, according to the amendment, court fees for class actions will be 8,000 shekels in the magistrates' court and 16,000 shekels in the district court.

The main objective of the amendment was to reduce the amount of groundless class actions. At the same time, the general assumption is that the new court fees are unlikely to deter worthy claims from being filed.

Since the amendment to the Fees Regulations entered into force in May 2018, there has been a downward trend in the submission of certification motions. However, a new trend is the submission of class actions in fields that are still exempt from court fees, such as: environmental damages claims; claims related to the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law 2000; and claims related to the Equal Rights for Persons with Disabilities Law 1998.

Statute of limitations

According to Israeli law, statute of limitations is seven years from the date of the creation of the cause of action, or the time that it was first known (or could have been known) to a reasonably diligent injured party. Class actions do not have a special statute of limitations. However, there are shorter periods of statute of limitations in several specific Laws and Regulations.

iv Damages and costs

Israeli law holds a flexible approach with regard to damages and causality in class actions, an approach anchored in statute by the express purposes of the Law, which include civil enforcement of the law.

A prevalent judicial approach is that while the damages awarded in classic tort actions are meant to provide 'corrective justice', a strict adherence to the traditional rules of damages would undermine the basic rationale of class actions as an effective apparatus in civil enforcement and as a mean to achieve deterrence against breaches of the law.

Punitive damages are not granted by Israeli courts, except in extreme circumstances and only if the statute that governs the claim allows punitive or exemplary damages, which are rare. Such is the case of class actions regarding the rights of people with disabilities.

The purpose of the class action is to reward the group members that actually endured the wrongdoing of the defendants, and suffered damage as a result. However, sometimes it is not possible to identify and trace the specific individuals that were injured or suffered from the wrongdoing. The Law and numerous rulings by the Israeli courts provided mechanisms for overcoming this problem. Thus, the court while rendering judgment in favour of the class

members may award damages or any other remedy (including declaratory relief), in favour of individuals that were not part of the represented group, for example, future customers of the defendants, even if they were not members of the original represented class.

The court may also order that a global sum of payment will be paid by the defendant. In the event that the proved claims of individuals do not reach this amount, it may give instructions for the distribution of any remainder for other purposes, such as donations.

Court expenses

The 'loser pays' rule applies in the Israeli legal system. However, the amount of the costs awarded is subject to the court's discretion, and there is a distinction between a case where the plaintiff loses (i.e., the motion for class certification is denied) and a case where the defendant loses (i.e. the motion for class certification is granted). In the event the plaintiff loses the case, the costs awarded to the defendant are almost always substantially lower than the actual costs incurred by the defendants. Sometimes, when the court finds that the class action is worthy, although it was dismissed, it may not award any costs to the defendants.

v Settlement

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IV CROSS-BORDER ISSUES

Cross-border jurisdiction issues may be highly relevant for multinational corporations facing class actions in Israel for breaches of various laws. The Law does not provide any territorial limitations regarding class actions. Therefore, cross-border issues will be dealt with according to the general Israeli rules regarding territorial jurisdiction and private international law. Thus, a foreign corporation may be the respondent or defendant in a class action, subject to procedural rules regulating service to foreign defendants.

An Israeli court acquires jurisdiction over a foreign defendant in one of three ways: (1) by direct service to the defendant (or to an officer of the defendant) within the territory of Israel; (2) by service to the defendant's 'authorised agent' in Israel; or (3) by service to the defendant abroad, subject to prior approval by the Israeli court.

The main obstacle in the plaintiff path to gain jurisdiction over a foreign defendant lies in the question of who is deemed (in the eyes of the court) to be an authorised agent of the defendant. The case law has established a fact-dependent 'intensiveness of relationship' test, which examines various objective factors to determine whether the agent in fact reports to the foreign defendant or does business on its behalf in the territory, or both.

Numerous decisions ruled that the examination is mainly factual. Thus, 'intensive relationship' with one foreign company does not necessarily constitute a relationship with another group affiliate of that company. Similarly, the mere fact of an exclusive distributorship, unless supported by evidence of additional factors, does not in itself constitute an 'authorised agency' of the foreign defendant. Similarly, the mere fact that a local company is affiliated or a member of the foreign company's group does not necessarily constitute an authorised agency.

As stated above, the court will review in detail all facts and evidence pertaining to the matter in order to decide whether there is an 'authorisation' by the foreign defendant to act on its behalf or represent it in Israel, or both, and the nature of the relationship between the foreign defendant and the local individual or corporation, and to what extent is there an 'intensive relationship' between the parties.

Even if a foreign corporation does not have an authorised agent in Israel, it may be directly served with the motion to approve the class action, subject to a leave by the Israeli court.

In a series of rulings in the past two years, Israeli courts addressed the issue of class actions filed against foreign and multinational corporations like Facebook, Booking.com, Hotels.com and others. The defendants in those cases each argued that Israel is not the right forum to adjudicate the claims and that even if the cases can or may be litigated in Israel, it should be according to a foreign law, not the Israeli law, as the choice of each foreign corporation in its ‘terms and conditions’.

In those cases, that involve foreign companies operating in Israel through a global internet platform, the courts have interpreted in a broad way the Procedural Regulations,² which governs the issue of jurisdiction over foreign defendants. As a result, plaintiffs in class actions could bring their claims against foreign corporations before the Israeli court.

The Supreme Court in a seminal verdict in 2018 in a class action that was filed against *Facebook*³ ruled that a clause in a standard Facebook contract regarding the jurisdiction (stipulating that the jurisdiction of a claim against the corporation is solely in the state of California), is invalid, since it deprives Israeli consumers of their right, pursuant to the Standard Contracts Law, to bring their disputes before an Israeli court. However, the Supreme Court recognised and gave effect to another provision in the Facebook standard contract regarding the governing law (of the state of California), and thus ruled that the class action shall be conducted in Israel, but according to California’s laws.

The Supreme Court decided that this choice of law, although made solely by one party (the supplier of the services, the defendant – Facebook) this choice is not an ‘unfair condition’, thus the court upheld this choice, while stating that this ruling is mainly because the law of state of California is similar to that of Israel.

Although *forum non conveniens* is a doctrine applied at a court’s discretion on a case-by-case, and based on the facts of each case, the case law in Israel indicates that where the (foreign) service provider reaches for the Israeli consumer through the internet in the Hebrew language, or where it provides customer service in Israel or in Hebrew, the courts will most probably deny the foreign defendant’s arguments that the Israeli forum is inconvenient.

A foreign corporation doing business in Israel might be exposed to class actions regarding the infringement of competition law, sometimes as a follow-on class action. A prominent example is the class action filed against LG, Samsung, Optronic and others, for alleged violations of the competition law, by creating a cartel regarding flat screens.⁴

The district court reversed the registrar’s decision on appeal, and denied the plaintiffs’ motion, allowing the service of proceedings against the foreign defendants.⁵ This decision was later approved by the Supreme Court, even though the court criticised the narrow language of the Procedural Regulations.⁶ This decision later led to an important amendment of the Procedural Regulations to include a new subsection. The new Section 500(7a) provides that

² Regulation 500.

³ Lv.Civ.App.5860/16 *Facebook Inc v. Ben Hemo* (published Nevo, 31 May 2018).

⁴ Cls. Act. (Central) 53990-11-13 *Hatzlachah Consumer Movement for an Economically Just Society v. AU Optronic Corp et al.* (published Nevo, 6 March 2016); on appeal: App. Reg. 57451-03-16 *Hatzlachah Consumer Movement for an Economically Just Society v. AU Optronic Corp et al.* (published Nevo, 29 December 2016).

⁵ Cls. Act. (Central) 46065-09-14 *Ben Hemo v. Facebook Inc.* (published Nevo, 10 June 2016).

⁶ Lv.Civ.App.5860/16 *Facebook Inc v. Ben Hemo* (published Nevo, 31 May 2018).

an Israeli court may hear a claim for damages where the damage occurred in Israel even though the act or omission that caused the damage occurred outside Israel's borders. The claim must be based on damage caused to the plaintiff in Israel from a product, service or behaviour of the defendant and that two additional conditions must be met: (1) the damage caused to the plaintiff in Israel must be from a product, service or behaviour of the defendant that the defendant could have expected that the damage would be caused in Israel; and (2) the defendant or a related person must be engaged in international trade or provide considerable international services.

This amendment has increased the risk to a foreign company of being sued for damages in a class action in Israel. The assumption is that the foreign company can expect the damage to occur in Israel and, therefore, be able to take precautions against it occurring.

In another matter – the *Booking* case,⁷ the Tel Aviv district court accepted (in February 2019) a motion to certify a class action against Booking, claiming that Booking did not notify its online customers prior to placing an order, about the total price that would be paid, as it is required to according to Israeli law. The court ruled that while offering service online to Israeli customers, the company is liable to Israeli jurisdiction.

V OUTLOOK AND CONCLUSIONS

Recent developments in Israel's case law on class actions include an increased tendency of courts to rule in favour of motions for approval of a class action, alongside increased judicial review of the personal cause and damages by the lead plaintiff. There is also a tendency to accept motions to dismiss class actions on the basis of lack of personal cause, lack of personal damage, statute of limitation or the fact that the claim does not meet the prior conditions for a class action.

There are no formal statistics, but the majority of class actions are either rejected by rulings or concluded by withdrawal, sometimes compensated withdrawal. Our forecast for the future is that class action are here to stay in Israel, and though there are many attempts to reduce their amount, these attempts are rather futile to this day.

⁷ C.A. 67771-07-18 *Booking.com B.V. v. Daniel Sapira* (published Nevo, 20 February 2019).

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